166-717

166-717

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 345.

ADAM S. B. BAKER, PLAINTIFF IN ERROR,

vs.

JOHN BRICKELL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED SEPTEMBER 28, 1895.

(16,038.)

(16,038.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 345.

ADAM S. B. BAKER, PLAINTIFF IN ERROR,

vs.

JOHN BRICKELL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

INDEX.

	Original.	Print.
Caption	*a*	1
Transcript from superior court	1	1
Complaint in equity	1	1
Default of defendant Maria Baker Batchelder	24½	12
Separate answer of John Brickell	24½	12
Supplemental answer of John Brickell	38	18
Order overruling demurrer to supplemental answer	40½	19
Amendment to complaint and supplemental complaint	40½	20
Demurrer to supplemental complaint	43	21
Order sustaining demurrer to supplemental complaint	43	21
Demurrer to amended complaint	44	22
Order overruling demurrer to amended complaint	46	23
Separate answer of John Brickell to amendment to complaint	46	23
Findings of fact	48	24
Conclusions of law	82	39
Decree	87	41
Certificate to judgment-roll	87½	41
Plaintiff's statement on motion for new trial	87½	42
Evidence and documents offered by plaintiff and admitted	88	42
Deed, James C. Garner to John H. Baker, July 10, 1860	88	42

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JANUARY 5, 1897.

	Original.	Print.
Petition of Maria Baker for letters of administration on estate of John H. Baker	90	43
Order of posting notice of foregoing petition	92	44
Proof of posting	92	44
Order appointing Maria Baker administratrix	92	44
Letter of administration	92	44
Order for publication of notice to creditors	92	44
Affidavit of publication	92	44
Decree of due publication	92	44
Inventory of said estate	92	44
Petition for family allowance	93	44
Order making family allowance	93	44
Annual account, &c.	93	44
Verified petition of said Maria Baker as administratrix, filed September 5, 1865	93	44
Inventory and appraisement, made July 19, 1867	93	44
Order of court, dated August 13, 1867, for sale of twenty-six acres of real estate to Wm. Ware	93	44
Subsequent account of said administratrix, filed December 20, 1867	93	44
Order of court confirming said sale, filed Sept. 9, 1867	93	44
Final account of said administratrix, dated and filed September 20, 1867	93	44
Report accompanying said account	94	44
Decree of court, dated December 20, 1867, filed December 30, 1867, settling said final account as rendered	94	44
Petition for distribution, dated January 13, 1868	94	44
Deed of J. H. Baker and Maria Baker to N. Porter and E. D. Sawyer	94	45
Deed of J. H. Baker and Maria Baker to the San Francisco water works	94	45
Deed of J. H. Baker and Maria Baker to Maria Jane Lundberg	95	45
Deposition of Mrs. C. B. Ware	95	45
Testimony of Maria Baker Batchelder	96	45
Portion of abstract furnished Brickell by Maria Baker	98	46
Testimony of Adam S. B. Baker	107	51
Summons and complaint in action in fourth district court in and for the city and county of San Francisco, commenced May 13, 1876	108	51
Findings in same cause	112	53
Conclusions of law in same cause	113	53
Decree in same cause	114	54
Verified petition of Maria Baker to board of supervisors of city and county of San Francisco for a grant to her of the lands described in the complaint	117	55
Act of Congress of the United States approved March 8, 1866, entitled "An act to quiet the title of certain lands within the corporate limits of the city and county of San Francisco"	122	58
Testimony of Joseph H. Moore	122	57
Evidence and documents offered by John Brickell	124	58
Testimony of John Brickell	124	58

	Original.	Print.
Testimony of George Martin	130	61
Judgment-roll in case entitled Maria Baker Batchelder *vs.* Adam S. B. Baker, in the fourth district court, No. 20431	132	62
Summons in same action	133	63
Certificate to judgment-roll in same cause	136	64
Remittitur in same cause	137	65
Testimony of J. H. Moore	138	65
Tax receipts for fiscal year 1862-'3	144	68
Delineation of the outside land map of the Baker tract	144	68
Annual account of administratrix, filed Aug. 7, 1865	144	68
Partial release of mortgage, dated June 1, 1874	144	68
Verified complaint in action entitled Maria Baker *vs.* A. W. Von Schmidt, in the district court of the fifteenth district, No. 7687	144	68
Verified answer in suit of A. W. Von Schmidt *et al. vs.* David F. Batchelder *et al.*, in the district court, filed August 8, 1874	145	68
Verified answer in foreclosure suit of John Brickell *vs.* Maria B. Batchelder *et al.*, in the twenty-third district court, brought June 25, 1878	145	68
Verified complaint in ejectment suit of Maria B. Batchelder *vs.* John Brickell *et al.*, superior court, city and county of San Francisco, No. 9763	145	68
Verified complaint in action of Maria Baker *vs.* Alexander Austin, tax-collector, &c., brought in the twelfth district court June 6, 1870, No. 15709	145	68
Deed, Maria Baker to E. D. Sawyer, dated August 21, 1874	146	69
Mortgage to Maurice Dore, dated August 17, 1872	146	69
Mortgage to Savings and Loan Society, dated December 30, 1872	146	69
Deed to city and county of San Francisco, dated January 15, 1873	146	69
Deed to Nathan Porter and S. W. Holladay, dated September 1, 1873	146	69
Deed to E. D. Sawyer, dated April 20, 1876	146	69
Deed to A. W. Von Schmidt, February 15, 1877	146	69
Deed, Lundberg to J. P. Buckley, dated May 13, 1864	146	69
Declaration of homestead of John H. Baker and Maria Baker, dated September 16, 1862	147	69
Abandonment of homestead by John H. Baker and wife, dated September 12, 1862	147	69
Declaration of homestead of John H. Baker and Maria, his wife, September 16, 1862	147	69
Testimony of P. H. Blake	149	70
E. M. Wilson	151	71
R. H. Linton	153	72
J. M. Wood	155	73
Washington Meeks	157	74
S. S. Tilton	158	74
Edward Knight	160	75
Chas. H. Reynolds	161	76

	Original.	Print.
Testimony of George Turner	162	76
F. B. Austin	163	77
Geo. H. Ferguson	163	77
Assignment of Maurice Dore mortgage, etc	164	77
Deed of reconveyance by E. W. Burr and Benj. Dean, trustee, dated June 1, 1874	164	77
Cancellation of mortgage made by Batchelder and wife to John Brickell, dated June 1, 1874	165	77
Evidence for plaintiff in rebuttal	165	78
Testimony of Edward Maher	165	78
M. S. Cook	167	78
John Hannan	168	79
James Riley	169	79
Milo Hoadly	171	80
E. D. Sawyer	172	81
Grounds for a new trial	175	82
Notice of motion for new trial	175	83
Specification of particulars in which the evidence is insufficient to justify decision	177	84
Specification of particulars wherein the decision is against the law	185	87
Assignment of errors of law	186	88
Judge's certificate to statement	189	89
Agreement as to statement	189	89
Notice of motion to vacate and set aside decision and findings and for a new trial	190	90
Order denying new trial	191	90
Notice of appeal	191	91
Stipulation as to transcript	192	91
Clerk's certificate	193	91
Proof of service of record on appeal	194	92
Opinion	195	92
Decree	200	95
Writ of error	202	95
Bond	205	96
Assignment of errors	209	98
Citation	214	100
Proof of service of citation	215	100
Clerk's certificate	220	102

a No. 15435. 2d appeal.

In the Supreme Court of the State of California.

ADAM S. B. BAKER, Plaintiff & Appellant,
vs.
JOHN BRICKELL and MARIA BAKER BATCHELDER, Defendants & Respondents.

Transcript on Appeal from the Superior Court of the City and County of San Francisco, State of California, John Hunt, Judge.

Fox & Kellogg, attorneys for plaintiff.
E. J. & J. H. Moore, A. N. Drown, attorneys for defendant Brickell.

Filed this 27th day of July, 1893.

L. H. BROWN, *Clerk.*
By P. V. LONG,
Deputy Clerk.

1 In the Supreme Court of the State of California.

Transcript on Appeal.

In the Superior Court of the City and County of San Francisco, State of California.

ADAM S. B. BAKER, Plaintiff,
vs.
JOHN BRICKELL and MARIA BAKER BATCHELDER, Defendants.

Complaint in Equity.

CITY AND COUNTY OF SAN FRANCISCO, *ss:*

Now comes the above-named plaintiff and against the above-named defendants complaining, for cause of action avers and shows:

I.

That John H. Baker died intestate at the city and county of San Francisco, in the State of California, on or about the thirtieth day of March, 1863, leaving him surviving Maria Baker, his
2 widow, now Maria Baker Batchelder, one of the above-named defendants and six children, his heirs-at-law, of whom plaintiff was one, then of the age of one year or thereabouts.

II.

That at the time of his death the said John H. Baker was the owner and in possession of the following-described tract or parcel

of land, situate in the said city and county of San Francisco, the same being a part of the outside lands (so called) of said city and county, to wit:

Commencing at a point on the Pacific ocean near Point Lobos, where what then was known as Sweeny & Baugh's east line intersected the Pacific ocean; running then south along said Sweeney & Baugh's east line 26.20 chains more or less; thence at right angles east 1,658 feet more or less to land formerly belonging to Mrs. Landberg, but late to the estate of John P. Buckley; thence at right angles north forty rods more or less; thence at right angles east one hundred rods more or less; thence at right angles south forty rods more or less; thence easterly along a fence there then standing to line of land formerly belonging to Porter & Sawyer, but subsequently to Nathan Porter; thence northwesterly along the westerly line of said last-mentioned tract twenty rods more or less to the northwesterly corner of said tract; thence east eighty rods more or less
3 to the northeasterly corner of said last-mentioned tract; thence north 36 30′ west to a point 150 feet south of Point Lobos creek; thence along the southerly side of said creek and 150 feet distant therefrom to the Pacific ocean; thence along the Pacific ocean to the point of beginning.

III.

That afterwards such proceedings were had in the probate court of the said city and county of San Francisco, in the matter of the estate of John H. Baker, deceased, as that the said Maria Baker (now Maria Baker Batchelder), was appointed administratrix of the estate of said John H. Baker, deceased, and duly qualified as such, and as such entered into the possession of the real estate aforesaid, and duly made and filed in the said probate court an inventory of said estate, including the lands aforesaid, and afterwards, under and by virtue of an order of said probate court the said administratrix, as such, sold and conveyed a portion of said real estate, not including any portion of these parts thereof hereinafter described, and used the proceeds thereof in paying the expenses of administration and claims against said estate.

IV.

That afterwards and while in possession of the residue of said real estate as such administratrix, and without closing such ad-
4 ministration, or procuring distribution of said estate, the said Maria Baker procured deeds of conveyance to herself, as the plaintiff is informed and believes from all the remaining heirs-at-law of said John H. Baker, deceased, except this plaintiff, of their respective interests in and to the residue of said lands, but she did not procure any conveyance thereof, or of any interest therein of or from this plaintiff, and this plaintiff has never made any conveyance of his interest in said land or in any part of the estate of said John H. Baker, deceased, to any person whomsoever.

V.

That afterwards and without closing said administration, or procuring or making any distribution of said estate, the said Maria Baker, being as plaintiff is informed and believes, wrongfully advised that she had the legal right so to do, sold and conveyed, and delivered possession of a certain other portion of the lands and premises hereinbefore described, but not including any portions or subdivisions hereinafter described, and took and received in exchange therefor, and in consideration thereof deeds of conveyance, running to herself and vesting the legal title thereof in her, of the following-described real estate situate in said city and county, to wit:

"That certain lot commencing at a point on the south-
5 easterly line of Bryant street, distant two hundred and seventy-five feet (275) northeasterly from the corner of Bryant and Eighth streets; running thence northeasterly along said southeasterly line of Bryant street, fifty-six (56) feet three (3) inches; thence at right angles southeasterly (along an alleyway twenty-five (25) feet wide), parallel with Eighth street, two hundred and seventy-five feet; thence at right angles southwesterly fifty-six (56) feet and three (3) inches; thence at right angles northwesterly two hundred and seventy-five (275) feet to the southeasterly line of Bryant street, and point of commencement. Being a portion of a 100-vara lot No. 211, as shown upon Eddy's map of the 100-vara survey of San Francisco."

And plaintiff is informed and believes, and upon and according to his information and belief avers, that the making of the change aforesaid, and the taking and accepting the title to the said last-mentioned lot by said Maria Baker in her own name, was a fraud upon the estate and heirs-at-law of said John H. Baker, deceased, and that by reason thereof the title so acquired by her was received and held, and has ever since been and is now held in trust for the benefit of the heirs-at-law of said deceased (or of their grantees) of whom this plaintiff is one, and he is entitled to share therein to the extent of one undivided one-twelfth part of the whole thereof.

6 VI.

That afterwards and in or about the month of December, 1872, the said administration not being closed, and no distribution of said estate having been had, the residue of said first tract of land having in the meantime been surveyed and platted into lots and blocks, as shown upon what is commonly called the map of the outside lands of the city and county of San Francisco, and the said defendant Maria Baker being still in possession thereof under the entry made as administratrix as aforesaid, she, the said defendant Maria Baker, wrongfully and fraudulantly concealing the fact that she was in possession and held possession thereof as administratrix as aforesaid, and claiming and pretending that she was in possession and entitled to the possession in her own right, and that she was the party entitled to a city deed therefor, under the act of Congress, approved March 8th, 1866, entitled "An act to quiet title to certain land

within the corporate limits of the city of San Francisco," and the statutes of the State and laws and ordinances of the city and *and* county of San Francisco in relation thereto, petitioned the board of supervisors of said city and county for a grant of the lands hereinafter described, the same being portions of the land in this complaint first above described, and under said petition such
7 proceedings were had in due form of law that a grant was made in accordance with the prayer of said petitioner, and afterwards and on the ninth day of January, 1873, in pursuance of said grant a deed was made and executed by the said city and county of San Francisco, by Wm. Alvord, mayor, to the said Maria Baker, conveying to her all the right, title and interest of the said city and county in and to and confirming in her the title of the following-described tracts and parcels of land, part of the land herein first above described to wit:

1. Commencing at a point on the westerly line of Twenty-fourth avenue, distant four hundred and sixty-two (462) feet and seven (7) inches northerly of California street; thence northerly thirty-six (36) feet eleven (11) inches; thence westerly two hundred and forty (240) feet to the easterly line of Twenty-fifth avenue; thence southerly on Twenty-fifth avenue, sixty-one (61) feet and two (2) inches; thence northeasterly two hundred and forty-one (241) feet and three (3) inches to the point of commencement. Being portion of block No. 95.

Also,

2. Commencing on the westerly line of Twenty-fifth avenue, four hundred and thirty-one feet (431) and three (3) inches northerly from California street; thence northerly one hundred and
8 sixty-eight (168) feet and nine (9) inches; thence westerly two hundred and forty (240) feet to the easterly line of Twenty-sixth avenue; thence southerly one hundred and ninety-three (193) feet and one (1) inch; thence northeasterly two hundred and forty-one (241) feet and three (3) inches to the point of commencement. Being portion of block No. 96.

Also,

3. Commencing on the westerly line of Twenty-sixth avenue, distant three hundred and ninety-nine (399) feet and ten (10) inches northerly of California street; thence northerly two hundred (200) feet and two (2) inches; thence westerly two hundred and forty (240) feet to the easterly line of Twenty-seventh avenue; thence southerly on Twenty-seventh avenue two hundred and twenty-four (224) feet and — (5) inches; thence northeasterly two hundred and forty-one feet and three (3) inches to point of commencement. Being portion of block No. 97.

Also,

4. Block number ninety-eight (98) entire, bounded by Twenty-seventh and Twenty-eighth avenues, California and — streets.

Also,

5. Block number ninety-nine (99) entire, bounded by Twenty-eighth and Twenty-ninth avenues, California and — streets.

Also,

6. Block number one hundred (100) entire, bounded by Twenty-ninth and Thirtieth avenues, California and — streets.

Also,

7. Block number one hundred and one (101) entire, bounded by Thirtieth and Thirty-first avenues, California and — streets.

Also,

8. Block number one hundred and two (102) entire, bounded by Thirty-first and Thirty-second avenues, California and — streets.

Also,

9. Commencing at the northwesterly corner of California street and Thirty-second avenue; thence northerly along Thirty-second avenue six hundred (600) feet; thence westerly one hundred and forty (140) feet and six (6) inches; thence southeasterly six hundred and three (603) feet and five (5) inches, more or less, to a point on the northerly line of California street; one hundred and sixty feet (160) and four (4) inches easterly from Thirty-third avenue; thence easterly on California street seventy-nine (79) feet and eight (8) inches to the point of commencement. Being portion of block No. 103.

Also,

10. Commencing on the westerly line of Thirty-second avenue, distant two hundred and twenty-four feet (224) and six (6) inches northerly from Clement street; thence northerly three hundred and seventy-five (375) feet and six (6) inches to the southerly line of California street; thence westerly seventy-one (71) feet and seven (7) inches; thence southerly three hundred and eighty-one (381) feet and two (2) inches to a point two hundred and eleven (211) feet and four (4) inches easterly of Thirty-third avenue; thence northeasterly twenty-nine (29) feet and eight (8) inches to a point of commencement. Being portion of block No. 150.

Also,

11. Commencing on the westerly line of Thirty-first avenue, distant two hundred and fifty-six (256) feet and eight (8) inches northerly from Clement street; thence northerly on Thirty-first avenue three hundred and forty-three (343) feet and four (4) inches to the southerly line of California street; thence westerly two hundred and forty (240) feet; thence southerly three hundred and sixty-eight (368) feet and two (2) inches; thence northerly two hundred and forty-one (241) feet and three (3) inches to the point of commencement. Being portion of block No. 151.

Also,

12. Commencing on the westerly line of Thirtieth avenue, distant three hundred and seventy-five (375) feet northerly of
11 Clement street; thence northerly two hundred and twenty-five (225) feet to California street; thence westerly two hundred and forty (240) feet; thence southerly two hundred and twenty-five (225) feet thence easterly two hundred and forty (240) feet to point of commencement. Being portion of block No. 152.

Also,

13. Commencing on the westerly line of Twenty-ninth avenue distant three hundred and twenty feet (320) and ten (10) inches northerly of Clement street; thence northerly on Twenty-ninth avenue two hundred and seventy-nine (279) feet and two (2) inches to California street; thence westerly two hundred and forty (240) feet; thence southerly three hundred and three (303) feet and eleven (11) inches; thence northeasterly two hundred and forty-one (241) feet and — (3) inches to point of commencement. Being portion of block No. 153.

Also,

14. Commencing on the westerly line of Twenty-eighth avenue, distant three hundred and fifty-two (352) feet and eleven (11) inches northerly from Clement street; thence northerly two hundred and forty-seven (247) feet and one (1) inch to California street; thence westerly two hundred and forty (240) feet; thence southerly two hundred and seventy-two (272) feet and two (2) inches;
12 thence northeasterly two hundred and forty-one (241) feet and three (3) inches to the point of commencement. Being portion of block No. 154.

Also,

15. Commencing on the westerly line of Twenty-seventh avenue, distant three hundred and eighty-four (384) feet and three (3) inches northerly of Clement street; thence northerly two hundred and fifteen (215) feet and nine (9) inches to California street; thence westerly two hundred and forty (240) feet; thence southerly two hundred and thirty-nine (239) feet and eleven (11) inches; thence northeasterly two hundred and forty-one (241) feet and three (3) inches to point of commencement. Being portion of block No. 155.

Also,

16. Commencing at a point distant six hundred (600) feet northerly of California street, and ninety-nine (99) feet and six (6) inches easterly of the easterly line of Thirty-third avenue; thence north nine (9) degrees, west 6 2-11 chains; thence north seven (7) degrees, west five and nineteen (5.19) hundredths chains to the Pacific ocean; thence following along the shores of the Pacific ocean south seventy-eight and one-quarter ($78\frac{1}{4}$) degrees, east three and ninety-

five (3.95) hundredths chains, thence north fifty and three-
13 quarters (50¾) degrees, east sixteen and forty-two hundredths (16.42) chains; thence north eighty-eight (88) degrees, east five and eighty-eight hundredths (5.88) chains; thence north four and a half (4½) degrees, east sixty-four links (64); thence north fifty-nine and one-quarter (59¼) degrees, east seventy-nine (79) links; thence south fifty-nine and three-quarters (59¾) degrees, east eighty links; thence north sixty-nine and three-quarters (69¾) degrees, east one and eighty-hundredths (1.80) chains thence north eighty-three and three-quarters (83¾) degrees, east seventy-six (76) links; thence south seventy-nine and one-quarter (79¼) degrees, east one and forty-one hundredth- (1.41) chains; thence north forty-six and three-quarters (46¾) degrees, east five and eleven (5.11) hundredths chains, leaving shore at this point; thence south seventeen (17) degrees, east thirteen and three-hundredths (13.3) chains; thence south twenty-five and three-quarters (25¾) degrees, east twelve and fifty-five (12.55) hundredths chains to a point six hundred (600) feet north of California street, and twenty (20) feet east of the west line of Twenty-fourth avenue; thence south eighty-six (86) degrees forty minutes, west two thousand six hundred and twenty-five (2,625) feet, more or less, to the point of commencement, containing sixty-three and seventy-one (63.71) hundredths acres.

Also,

14 17. That certain piece or parcel of land lying upon the east of the tract of land last above described, which is bounded and described as follows: Commencing at the northeasterly corner of said last-mentioned tract, and running thence north 46¾ degrees, east 3.48 chains; thence south 56½ degrees, east 87 feet; south 10 degrees, east 3.00 chains; south 49¾ degrees, east 2.87 chains; south 79 degrees east 3.33 chains; south 3 degrees, east 2.95 chains; south 34¾ degrees, west 2.45 chains; south 9 degrees, west 2.00 chains; south 43¾ degrees, west 1.00 chain; south 6½ degrees, east 2.75 chains; thence south 84 degrees 45 minutes east 2.50 chains; thence southerly 600 feet more or less to the northeasterly corner of block No. 95 thence northerly along the easterly line of tract last above described 25¾ degrees, west 12.55 chains; thence north 17 degrees, east 13.03 chains to the point of commencement.

Which deed was afterwards recorded in the office of the county recorder of the said city and county, in Liber 721 of Deeds, at page 121 and following. And plaintiff is informed and believes, and upon and according to his information and belief, avers that the procuring and taking of said deed by the said Maria Baker in her own name was a fraud upon the estate and heirs-at-law of the said John H. Baker, deceased, and that by reason thereof the title so acquired by her was received and held, and ever since has
15 been, and now is held in trust for the benefit of the heirs-at-law of said deceased (or their grantees) of whom this plaintiff is one, and he is entitled to share therein, to the extent of one undivided one-twelfth part thereof. And plaintiff avers that all the cost of procuring such title, and of the management and care of said

property, though procured and managed in the name of said Maria Baker, was paid by and out of the estate of said John H. Baker deceased, and not otherwise.

VII.

That afterwards and prior to the first day of June, 1874, said Maria Baker intermarried with one David F. Batchelder, and thereafter and on the first day of June, 1874, the said Maria Baker, then Maria Baker Batchelder, joined with her said husband, David F. Batchelder, in making, and did make and execute and deliver to the defendant John Brickell, a mortgage upon all the lands described in subdivisions V and VI of this complaint to secure the repayment of the sum of $36,000, then and there loaned to said Batchelder by said Brickell.

And plaintiff upon and according to his information and belief, avers that the property so mortgaged as aforesaid, was at the time of the full value of $200,000 or more; that it was the prop-
16 erty of the estate and heirs-at-law of said John H. Baker deceased, and not of the said mortgagors, or either of them, that the administration of said estate had not been closed and no distribution thereof made; that the legal title to said property acquired by and standing in the name of Maria Baker, then and now Maria Baker Batchelder, as hereinbefore stated, was acquired and held by her in trust for the estate and heirs-at-law of said John H. Baker deceased, and not otherwise; that the said defendant John Brickell, at the time of the death of said John H. Baker, and at all the time from thence hitherto well knew and had full knowledge of the fact that said Baker died seized and possessed of the real property in this complaint first above described, and that the same was of the estate of said John H. Baker deceased; of the existence of this plaintiff, and of each and every of the heirs-at-law of said deceased; of the appointment of said Maria Baker as administratrix as aforesaid; of the making and filing of the inventory aforesaid, showing that said property was claimed and held by her as belonging to said estate, and not in her own right; of the jurisdiction of the court over the same, and of the sale of a portion thereof under the order of the court, and the application of the proceeds of such sale to the payment of the expenses of administration, and of claims against the estate, and he well knew, and had full knowl-
17 edge of the fact that the real property described in subdivision V, of this complaint, and included in the mortgage aforesaid was acquired and received by the said Maria Baker in exchange for a portion of the outside lands aforesaid so belonging to said estate, and that the title thereto so acquired and held by her was held in trust for said estate; and the heirs-at-law of said deceased, and not otherwise, and in like manner he knew and had full knowledge that the administration of said estate had not been closed, or distribution thereof made, and that the title acquired under the said deed of January 9th, 1873, was acquired and held in fraud of the rights of said estate, and of the heirs-at-law of the said deceased, and was held in trust for said estate and of said heirs-at-law, of whom

he knew this plaintiff was one; and the said defendant took and accepted said mortgage with full knowledge of all the facts aforesaid, and in this complaint stated, and said mortgage was duly recorded.

VIII.

And plaintiff is informed and believes, and upon and according to his information and belief, avers that afterwards, and on or about the thirteenth day of May, 1876, this plaintiff being then about fourteen years of age, the said defendant John Brickell, contriving and intending to cheat and defraud this plaintiff, and with
18 intent to cheat and defraud this plaintiff, retained counsel to bring suit and cause- and procured suit to be brought in the district court of the fourth judicial district of the State of California, in and for the city and county of San Francisco, in the name of the defendant Maria B. Batchelder as plaintiff, against this plaintiff as defendant, which suit was numbered 20431 of the suits in said fourth district court, and on the said 13th day of May, 1876, caused complaint in said action to be filed, setting up and alleging that the plaintiff in said action was the owner in fee of all the lands described in subdivision VI of this complaint, that this plaintiff (the defendant in said action) claimed some right title or interest therein, but that he had no right, title or interest therein, and praying a decree quieting title to said property in favor of the plaintiff in said action and against this plaintiff, the defendant therein; that he fraudulently procured summons to be issued upon said complaint, and afterwards to be returned with the affidavit of one George Martin (not an officer of the court) endorsed thereon or affixed thereto, to the effect that said summons had been duly served upon the defendant in said action, this plaintiff, on the said 13th day of May, 1876. But plaintiff avers that no summons in such action was ever served upon him, and he never had any knowledge that such or any
19 action had been commenced against him, or of any proceedings therein, until in or about the month of May, 1885, when he first learned thereof through his counsel Messrs. Fox & Kellogg, who at his request were then examining into his title to the premises aforesaid, and he further avers that he never appeared in said action, or authorized any person to appear for him, and upon and according to his information and belief he avers that no petition or application was ever made to said or to any court or judge in his behalf, for the appointment of a guardian *ad litem* in said action, and that the court never acquired or had jurisdiction over the person of this plaintiff, the defendant in said action, or to make or enter any judgment or decree therein whatever. Yet nevertheless, plaintiff upon and according to his information and belief, avers that the said defendant John Brickell, with intent to cheat and defraud this plaintiff, retained and procured counsel to appear for and on behalf of this plaintiff as defendant in said action, and counsel so procured and paid by him did so appear. And in the said action such proceedings were had, but without the authority of law, as that afterwards, and on or about the 15th day of August, 1876, a judg-

ment and decree of the court was ordered and signed, quieting title of the plaintiff in said action against this plaintiff as de-
20 fendant therein. And plaintiff upon and according to his information and belief, avers that all the proceedings in said action were fraudulent, and were had and done with intent to cheat and defraud this plaintiff, then a minor, and that although the defendant John Brickell was not a party to said action on either side, the whole case was instituted and conducted on both sides by his procurement and at his expense.

IX.

That afterwards and on the twenty-fifth day of June, 1878, the said defendant John Brickell, in further pursuance of his intent to cheat and defraud this plaintiff, commenced an action in the district court of the twenty-third judicial district of the State of California, in and for the city and county of San Francisco, against the defendant Maria Baker Batchelder and the said David F. Batchelder, but without making this plaintiff a party thereto, for the foreclosure of the mortgage aforesaid. And in the said action such proceedings were had as that afterwards and on the 26th day of November, 1878, judgment and decree of foreclosure was made, given and entered therein, and afterwards and in due course all the said real estate described in subdivisions V and VI of this complaint and covered by said mortgage, was sold under the said decree and bid in by the said John Brickell for less than one-half the real and true
21 value thereof, and afterwards he received the sheriff's deed therefor, and for the whole thereof, and thereupon wrongfully and fraudulently claimed and has ever since wrongfully and fraudulently claimed, and now wrongfully and fraudulently claims to be the owner of said property and every part thereof, and of the whole thereof. And on or about the first day of January, 1880, the said defendant John Brickell wrongfully took possession of said property, and of every part and parcel thereof, and of the whole thereof, and wrongfully ousted and ejected this plaintiff therefrom, and has ever since wrongfully kept, and still does wrongfully keep this plaintiff ousted and ejected therefrom, and has wrongfully denied, and still wrongfully denies, that this plaintiff has any right, title or interest therein to plaintiff's damage ten thousand dollars.

X.

And plaintiff avers that he is the owner, and entitled to the possession of the undivided one-twelfth part of all the said land and real property so held by said defendant, to wit: of each and every lot and parcel of land described in subdivisions V and VI of this complaint, and that the value of the use and occupation of said one-twelfth part of the premises is, and has been since the first day of January, 1880, the full value and sum of one thousand dollars per annum.

22 XI.

Plaintiff further avers that he is now of lawful age, but that three years have not expired since he reached his majority.

Wherefore plaintiff brings suit and prays judgment and decree of this hon. court: that the said judgment and decree of the district court of the fourth judicial district court of the State of California, in and for the city and county of San Francisco, in case number 20431 aforesaid entitled Maria B. Batchelder against Adam S. B. Baker is fraudulent and void, and vacating and setting aside the same; that the title held by the said Maria Baker Batchelder on the first day of June, 1874, was, as to the undivided one-twelfth part of all the lands and premises described in subdivisions V and VI of this complaint, and at all times thereafter continued to be held in trust for the benefit of this plaintiff; that the said defendant Brickell took under his said mortgage and under the foreclosure thereof with full knowledge of said trust, and acquired no title as against this plaintiff; that this plaintiff was then and still is the owner of the undivided one-twelfth part of said land and premises and of each and every part thereof, and is entitled to be let into possession thereof, and commanding and requiring of said defendants and each of them

23 that they let this plaintiff into possession of said undivided one-twelfth part thereof, and of each and every part thereof, and forever quieting the title of this plaintiff thereto, as against the said defendants and each of them and all persons claiming under them, also that he have judgment against the said defendant John Brickell for the sum of ten thousand dollars damages, and for the further sum of one thousand dollars per annum from the first day of January, 1880, to the date of said judgment, as and for the use and occupation, rents and profits of said premises, and also judgment against the said defendants for his costs of this action, and for such other and further, or other or further order or relief in the premises as may be just, equitable or lawful.

FOX & KELLOGG,
Attorneys for Plaintiff.

CITY AND COUNTY OF SAN FRANCISCO, *ss*:

Adam S. B. Baker being first duly sworn deposes and says that he is the plaintiff above named, that he has heard read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters which are therein stated on his knowledge or belief, and as to those matters he believes it to be true.

ADAM S. B. BAKER.

24 Subscribed and sworn to before me this 20th day of June, A. D. 1885.

W. B. McCLELLAN,
[SEAL.] *Notary Public.*

(Endorsed:) Filed June 20, 1885. Jas. J. Flynn, clerk, by L. J. Welch, deputy clerk.

24½ *Default of Defendant Maria Baker Batchelder.*

In this action, the defendant Maria Baker Batchelder, having been regularly served with process and having failed to appear and answer the plaintiff's complaint on file herein, and the time allowed by law for answering having expired, the default of said defendant in the premises is hereby duly entered according to law by order of the court.

Attest my hand and seal of said court this 14th day of January, 1886.

JAS. J. FLYNN, *Clerk*,
[SEAL.] By JOHN J. KENNY,
Deputy Clerk.

(Title of Court and Cause.)

Separate Answer of John Brickell.

Now comes the defendant John Brickell, and answers separately the complaint heretofore filed herein as follows:

He denies that John H. Baker at the time of his death, or at any other time or at all was the owner of the tract or parcel of land or any part thereof described in the second subdivision of the complaint.

As to the allegation that said John H. Baker was at said time in possession of said tract or parcel of land, he has no information or belief upon the subject sufficient to enable him to answer said allegation, and therefore denies the same.

He denies on information and belief that Maria Baker as administratrix of the estate of John H. Baker, deceased, entered into or was ever in possession as such administratrix of said real estate or any thereof, either at the time mentioned in the complaint or at any other time.

25 This defendant denies on information and belief that while in the alleged possession of said real estate, or any thereof as such administratrix, or otherwise in possession than by her own personal right, said Maria Baker procured deeds of conveyance to herself from all or any of the remaining heirs-at-law of said John H. Baker, deceased, except the plaintiff of their respective interests or any thereof, in or to the residue or any portion of said lands mentioned in complaint.

As to the allegation in subdivision V of said complaint contained, in regard to said Maria Baker having without closing the administration, or having distribution of said J. H. Baker's estate sold and delivered possession of certain lands in the complaint mentioned, and taken and received in exchange therefor deeds of conveyance to herself of other lands referred to, and in said subdivision of the complaint described, this defendant has no information or belief on the subject sufficient to enable him to answer said allegation as to said lands and all thereof, and therefore denies the same.

He denies on information and belief that the said exchange, and the taking to herself such title if done, was a fraud upon the estate, and heirs-at-law, or any of them of John H. Baker, deceased.

Denies, that by reason thereof, or otherwise, or at all, the
26 title to the lot of land in said subdivision described, or any thereof, was received or held, or has ever at any time since been held by said Maria Baker in trust for the benefit of the heirs-at-law, or any of them of said deceased, or of the alleged grantees or any of them, and denies that plaintiff is entitled to share therein to the extent of one undivided twelfth part of the whole thereof, or to any extent, divided or undivided, or otherwise, or at all.

This defendant denies that on or about the month of December, 1872, or at any other time, or at all, said Maria Baker was in possession under any entry made as administratrix of said estate, of the lands or any thereof, described in subdivision VI of said complaint.

Denies, on his information and belief that she wrongfully or fraudulently, or otherwise, or at all, concealed any fact as to her possession of any of said lands, or that she wrongfully or fraudulently or falsely claimed or pretended that she was in possession and entitled to the possession of said lands or any thereof in her own right, under said act of Congress or statutes of the State, or laws or ordinances of the city and county of San Francisco.

Denies, that she wrongfully, or fraudulently or falsely claimed, or pretended that she was the party entitled to a city deed therefor, or otherwise, than justly in her own right petitioned for a
27 grant thereof, and denies that she was in possession or held possession as administratrix of said estate.

He denies on his information and belief that the procuring or taking of the city deed of said lands, or any thereof, in said subdivision described by said Maria Baker in her own name, was a fraud upon the estate or heirs-at-law, or any of them of said John H. Baker, deceased.

Denies, that by reason thereof, or for any reason, or at all the title so acquired by her to said lands or any thereof was received or held, or that it ever since has been or is now held by her, or that it was ever held by her in trust or for the benefit of the heirs-at-law, or any or either of them, (or their grantees) of said deceased.

Denies that plaintiff is entitled to share therein to the extent of one undivided one-twelfth thereof, or to any extent, or at all.

Denies that all the cost, or any thereof, of procuring such title, or of the management or care of said property or any of it, was paid by, or out of the estate of said John H. Baker deceased.

This defendant denies that any portion of the sum of $36,000, alleged in subdivision VII of the complaint to have been loaned to the said husband (Batchelder) of said Maria Baker, upon a mortgage of the lands described in subdivisions V and VI thereof
28 was ever loaned to her said husband by said Brickell, but to said Maria Baker, who was then the sole owner of said lands, and denies that the value of said lands was at the time it was mort-

gaged of the value of $200,000, or more, and on his information and belief avers that it was not then worth over $100,000.

He denies that said property so mortgaged, or any of it was the property of the estate, or of the heirs-at-law, or any or either of them of said John H. Baker, deceased. On the contrary he alleges that the same and all thereof was the separate property of Maria Baker Batchelder.

Denies on information and belief that the legal title to said property or any thereof was ever acquired, or ever held by her in trust for the estate or the heirs-at-law, or any or either of them of John H. Baker, and alleges in like manner that she held the same at all times in her own right, alone and free from any trust whatsoever.

This defendant denies that at the time of the death of said John H. Baker, or that at all the time from thence hitherto, or at any time or otherwise, or at all, he, defendant well, or at all knew or had full or any knowledge of the alleged fact that said Baker died, seized, or possessed of the real property, or any thereof mentioned in the complaint, or that the same or any of it was of the estate of said John H. Baker, deceased, or of said plaintiff, or of each
29 and every of the heirs of said deceased, or of either or any of them; and denies that said real property or any thereof was of said estate, or was the estate of said plaintiff, or of either or any of said heirs.

Denies that at the time alleged, or at any time prior to the execution of any mortgage to him, referred to in the complaint, he knew of the appointment of said Maria Baker as said alleged administratrix; or of the making or filing of the inventory mentioned in complaint, or knew that it showed that said property, or any of it, was claimed or held by her as belonging to said estate, and not in her own right, or knew of the jurisdiction of the court over the same, or of a sale of a portion thereof under the order of the court; or knew of the application of the proceeds of such sale to the payment of the expenses of administration or of claims against the estate.

Denies that he well or at all knew, or that he had full knowledge, or any knowledge of the fact that the real property described in subdivision V of the complaint and included in the mortgage in complaint mentioned was, or any of it acquired or received by said Maria Baker in exchange for a portion of the outside lands belonging to said estate, and denies that it was so acquired or received.

This defendant denies that he well knew, or at all knew
30 or had full knowledge, or any knowledge, and denies that it is true, that the title of said lands or any thereof by plaintiff alleged to have been so acquired or held by her, was held by her in trust for said estate or the heirs-at-law, or either of them, of said deceased.

Denies that he in like manner or at all knew, or had full or any knowledge, that the administration of said estate had not been closed, or distribution thereof not made.

Denies that he knew, or that it is true that the title acquired under the said deed of January 9th, 1873, was acquired or held in

fraud of the rights of said estate, or of the heirs-at-law, or of any or either of them of said estate, and denies that he took or accepted said mortgage with full or any knowledge of all or any of the aforesaid alleged facts by plaintiff in his complaint, and denies that said allegations of fact, or any or either of them are or is true.

As to the allegation in subdivision VIII of the complaint contained, defendant further answering denies, and it is not true, that on or about the 13th day of May, 1876, or at any other time, this defendant contriving or intending to cheat or defraud the plaintiff, or with intent to cheat or defraud him, or otherwise or at all, retained counsel to bring suit, or caused or procured suit to be brought in the district court of the 4th judicial district of the
31 State of California, in and for the city and county of San Francisco, or elsewhere or at all, either in the name of the defendant Maria B. Batchelder as plaintiff against the present plaintiff as defendant, or otherwise or at all, either as suit No. 20431, in said 4th district court or otherwise.

Denies that on said 13th day of May, 1876, or at any other day or at all, he caused complaint in said or any action to be filed against said party defendant, setting up or alleging that the plaintiff in said action was the owner in fee of all, or any part of the lands described in subdivision VI of the complaint, or that the present plaintiff, then a defendant in said action, claimed some right, title or interest therein, or alleging that he had no right, title or interest therein, or praying a decree quieting title to said property in favor of the plaintiff in said action or against the present plaintiff or otherwise or at all, and defendant denies that he had any agency whatever in bringing or causing to be brought said or any such action.

Denies that he fraudulently or otherwise or at all procured summons to be issued upon said complaint, or afterwards to be returned with the affidavit of one George Martin or other person endorsed thereon, or affixed thereto, either to the effect that said summons had been duly served upon the defendant in said action or otherwise or at all, either on said 13th day of May, 1876, or at any other day or time.

32 This defendant denies on information and belief the allegation of the complaint that no summons in said action was ever served upon the plaintiff, or that he never had any knowledge that such or any action had been commenced against him till A. D. 1885, or that he never appeared in said action, or that no application or petition was ever made in his behalf for the appointment of a guardian *ad litem;* denies on like information and belief that the court never acquired or had jurisdiction over the person of plaintiff to make or enter a judgment or decree therein, and alleges in like manner that said summons was duly served on the plaintiff; that he the present plaintiff had full knowledge of the action when said summons was served; that he appeared as in like cases provided by law through a duly appointed guardian *ad litem*, on proper application for such appointment, and that the court acquired juris-

diction over the person of said defendant, now plaintiff, to enter judgment and decree therein as ordered.

Defendant denies that he, with intent to cheat or defraud plaintiff, or otherwise, or at all, retained or procured counsel to appear for or on behalf of the now plaintiff as defendant in said action, and denies that counsel so procured or so paid by this defendant did so appear; and denies that he did procure or did pay counsel for any purpose, or at all, in said or in any such action.

33 On his information and belief he denies, that the judgment and decree alleged by plaintiff to have been ordered therein was so ordered without authority of law, but in like manner alleges that the judgment and decree alleged to have been therein ordered, on or about August 15th, 1876, quieting title to plaintiff in said action against defendant therein, was valid in all respects. On like information and belief, defendant denies that all or any of the proceedings in said action were fraudulent, or were had or done with intent to cheat or to defraud the plaintiff. This defendant denies that the whole of said case or any part of it was instituted or conducted on both sides, or on either side, or at all, by his procurement, or at his expense, and he alleges that he had no agency whatsoever in bringing, or maintaining or causing the same.

This defendant denies that afterwards, either on the 25th day of June, 1878, or on any other day, or at all, this defendant in further or any pursuance of his alleged intent to cheat and defraud or to cheat or defraud the plaintiff, or with any other intent than to obtain his legal and equitable rights in the premises, "commenced the action in complaint" mentioned in the district court of the 23d judicial district for the foreclosure of the mortgage aforesaid.

34 This defendant admits that the sale was made in the course of said foreclosure of all the real estate described in subdivisions V and VI of the complaint, and that the same was bid in by this defendant, but denies that the same or any thereof was or were bid in for less than one-half or the whole of the real and true value thereof. On the contrary, he alleges that he bid in the same for more than five thousand dollars above such value. Admits that he afterwards received the sheriff's deed therefor, and for the whole thereof, but denies that he thereupon, or at all wrongfully or fraudulently claimed, or that he has ever since, or has at any time since, wrongfully or fraudulently claimed, or that he now wrongfully or fraudulently claims to be the owner of said property, or of every part thereof, but on the contrary alleges that he has rightfully claimed to be such owner by virtue of such foreclosure sale and sheriff's deed, and still rightfully claims to be, and he is such owner.

This defendant denies that on or about the first day of January, 1880, or at any other day or at all, he wrongfully took possession of said property, or of every or any part or parcel thereof, but alleges that his possession of all thereof was and is rightful; denies that he wrongfully ousted or ejected the plaintiff therefrom, or that he has ever since, or has at any time since wrongfully kept, or that he still

does wrongfully keep the plaintiff ousted or ejected there-
35 from, or from any thereof; denies that he has wrongfully denied or still wrongfully denies that the plaintiff has any right, title or interest therein, and denies that by the matters and things by plaintiff charged against defendant in subdivision IX of complaint, or by any thereof or otherwise, plaintiff has been damaged in the sum of $10,000, or in any other sum of money.

This defendant denies that plaintiff is the owner, or is entitled to the possession of the undivided one-twelfth part, or of any part divided or undivided of all or any of the said land or real property so held by defendant, or of any part or portion of each or of any lot or parcel of land described in subdivision V, or in subdivision VI of the complaint.

This defendant denies that the value of the use and occupation of said one-twelfth part of the premises is, or that it has been since the first day of January, 1880, the full value or sum of $1,000 per annum, or that it has been of the value or sum of over $300.00 per annum.

For other, further and separate answer and defense to plaintiff's complaint, and as and for a plea of estoppel thereto, this defendant alleges that heretofore, to wit, on or about the 13th day of May, 1876, the defendant Maria B. Batchelder brought her action as plaintiff in the 4th district court, in and for the city and county of San Francisco, of this State (numbered 20431), against
36 the plaintiff in this action to quiet her title against said plaintiff to all the lands and premises in and to which the plaintiff herein now claims an interest, and such proceedings were had therein: that it was duly decreed and determined by the judgment of said district court therein, in the year 1876, that the defendant Maria B. Batchelder in this action as against the plaintiff Adam S. B. Baker in this action was the owner of the lands described in subdivision VI of the complaint, and that said Baker had no right, title or interest therein, or in any portion thereof, which said judgment has never been reversed or appealed from.

That prior to said judgment and decree of said district court, as also subsequent thereto, to wit: between the first day of July, 1874, and the — day of September, 1877, said defendant Brickell loaned to said defendant Maria Baker Batchelder sundry sums of money, amounting in the aggregate to $42,500 or thereabouts, and to secure payment of the same, said Maria B. Batchelder and her said husband David F. Batchelder executed to said Brickell a mortgage of all the real estate to recover an interest in which this action is brought, and suit in foreclosure was afterwards in due time brought upon said mortgage to foreclose the same in the superior court of this city and county, and such proceedings were duly had in said
37 suit that a judgment and decree were therein duly given and made for the amount then due and for the sale of said premises so mortgaged, or so much thereof as should be necessary to pay the sums of money so loaned by the sheriff of said city and county, duly authorized thereto, and such sale was duly made, and the defendant Brickell at said sale became the purchaser thereof, and no

redemption thereof was ever made, and the time for redemption has long since expired, and in due time the sheriff's deed of the whole of said premises was executed to said Brickell, and he became and still is the owner and in possession of said lands and premises, and the plaintiff is by said heretofore-mentioned actions and proceedings and conveyances barred and estopped to prosecute this action, and the defendant Brickell now pleads said bar and estoppel to this action of plaintiff.

Wherefore this defendant prays that the complaint of said plaintiff be dismissed as to him, and as for his costs herein.

E. J. & J. H. MOORE,
Attorneys for Defendant John Brickell.

CITY AND COUNTY OF SAN FRANCISCO, } ss:
State of California, }

John Brickell being duly sworn, deposes and says: That he is one of the defendants in this action. That he has read the foregoing answer and knows its contents. That the same is true
38 of his own knowledge, except as to the matters therein stated on his information or belief, and as to those matters that he believes it to be true.

JOHN BRICKELL.

Subscribed and sworn to before me this 12th day of August, 1885.

SAMUEL S. MURFEY,
[NOTARIAL SEAL.] *Notary Public.*

(Endorsed:) Service by copy of within answer this August 12th, 1885, admitted. Fox & Kellogg, att'ys for pl'ff. Filed August 13th, 1885. Jas. J. Flynn, clerk, by J. J. Farrell, deputy clerk.

(Title of Court and Cause.)

Supplemental Answer of John Brickell.

The defendant John Brickell, by leave of court first obtained, makes and files this his supplemental answer to the complaint filed herein:

He alleges that since the filing and service of his separate answer to the complaint of plaintiff herein, to wit, on the 23d day of January, 1886, the judgment and decree in said original answer mentioned, to wit, the judgment and decree in favor of Maria B. Batchelder, his codefendant, and against the plaintiff herein, quieting her title against him, and decreeing her to be the owner of
39 the lands described in subdivision No. VI of the complaint in this action, was given and made, and was duly entered in the judgment book and records of the former fourth district court of this city and county in the action therein, numbered 20431, and he hereby pleads the same as an estoppel to plaintiff's alleged cause of action.

This defendant asks that this, his supplemental answer, be an-

nexed to his original answer and be filed as supplemental thereto, and that he have all the benefits of his original answer, and the relief therein prayed for.

E. J. & J. H. MOORE,
Att'ys for Def't Brickell.

STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

John Brickell, being duly sworn, deposes and says: That he is one of the defendants named in said action; that he has read the foregoing supplemental answer and knows the contents thereof, and that the same is true of his own knowledge.

JOHN BRICKELL.

Subscribed and sworn to before me this 28th day of January, 1886.

D. J. GORDON,
Dep. Co. Clerk.

(Endorsed:) Copy of the within this — day of January,
40 1886, admitted. ——— ———, att'ys for pl'ff. Filed in open court January 28th, 1886. Jas. J. Flynn, clerk, by Jno. J. Kenny, deputy clerk.

40½ *Minute Order Overruling Demurrer to Supplemental Answer.*

(Title of Court and Cause.)

In open court, Jan. 28th, A. D. 1886.

No. 15373.

The trial of this cause was this day resumed, Messrs. Fox & Kellogg, appearing as counsel for plaintiff, and Messrs. Moore & Moore, appearing as counsel for defendant. Counsel for defendant moved the court for leave to file a supplemental answer herein; which motion was by the court granted. Counsel for plaintiff demurred to said supplemental answer, and after respective counsel were heard, and the court being fully advised in the matter, it is ordered that said demurrer be, and the same is hereby, overruled. Plaintiff excepts. Counsel for defendant then called George H. Ferguson, who was duly sworn and examined as a witness. Whereupon by consent, counsel for plaintiff introduced certain documentary evidence out of order. Whereupon counsel for defendant, recalled George R. Turner and Joseph Moore, witnesses, who were each duly further examined, and defendant rests. Counsel for plaintiff in rebuttal called Michael I. Cook and Edward Maher, who were each duly sworn and examined as witnesses, upon which the further hearing of the cause was continued until February 1st, 1886.

(Title of Court and Cause.)

Amendment to Complaint and Supplemental Complaint.

First. The plaintiff, by leave of the court, makes and files this his amendment to his complaint herein—the same to read in and be a part of said complaint as paragraph IX½, and at the end of paragraph IX of said complaint, to wit:

IX½.

And plaintiff further avers that the said John H. Baker and his said estate and the said administratrix thereof were at all the times in this complaint stated, and ever since have been and still are the persons entitled to said lands in said deed, from said city and county described under and in pursuance of the terms, provisions and intention of said act of Congress, and at all said times were and are the beneficiaries in the premises under and by the provisions of said act of Congress, and a legal, proper and just interpretation thereof, and that the said act of Congress vested and still vests title in them.

Second. The plaintiff by leave of the court, after due notice, makes and files this his supplemental complaint in said action, to wit:

41 Plaintiff avers that since the commencement of this action, and during the progress of the first trial thereof, and after plaintiff had rested in said first trial, and while defendant Brickell was putting in his case for his defense herein, and on January 23d, 1887, said defendant Brickell, at his own cost and expense, and without the consent or knowledge or authority of said Maria Baker Batchelder, caused said decree in said action of Maria Baker Batchelder against said Adam S. B. Baker, in the late said 4th district court in complaint named, (and being numbered 20431) to be entered, and that such entry was the first entry of said decree ever made, and was more than ten years after the signing thereof, and that such entry of said decree was ordered by the attorneys herein of said Brickell, and being so ordered and made without the consent or knowledge or authority of said Maria Baker Batchelder was and is fraudulent and void, and of no force or effect whatever; and that for the reasons above stated, and in plaintiff's complaint in this behalf stated all proceedings in said action last named, were and are fraudulent and void. And plaintiff avers that he appealed from said decree on said January 23d, 1887, to the supreme court of this State, and that such appeal was not determined or decided till May 25th, 1889, when such decree was affirmed.

42 Wherefore, plaintiff prays as in his said original complaint herein, and that said decree and said entry thereof be declared fraudulent and void, and be annulled and set aside.

FOX & KELLOGG,
Attorneys for Plaintiff.

STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

A. S. B. Baker, being first duly sworn, deposes and says: That he is the plaintiff above named; that he has read the foregoing amendment to the complaint filed herein and the foregoing supplemental complaint, and knows the contents of each thereof, and that the same and each thereof are true of his own knowledge, except as to the matters therein, and in each thereof stated on information or belief, and that as to those matters he believes the same and each thereof to be true.

ADAM S. B. BAKER.

Subscribed and sworn to before me this 18th day of September, 1891.

[SEAL.] THOS. E. HAVEN,
Notary Public.

(Endorsed:) Service of copy of within is hereby admitted this 18th day of Sep., 1891. E. J. & J. H. Moore, att'ys for def't Brickell. Maria B. Batchelder, def't in person. Filed Sept. 25, 1891. Wm. J. Blattner, clerk, by H. F. Morris, dep. clerk.

43 (Title of Court and Cause.)

Demurrer.

Now come the defendants and demur to the supplemental complaint heretofore filed herein, and for grounds of demurrer specify the following, appearing on the face of said supplemental complaint, viz:

First. That the said supplemental complaint does not state facts sufficient to constitute such supplemental complaint, or to constitute any cause of action, original or supplemental.

E. J. & J. H. MOORE,
Att'ys for Defendants.

Service of copy of the within this 26th day of September, 1891, admitted.

FOX & KELLOGG,
Att'ys for Plaintiff.

Filed Sep. 30, 1891.

WM. J. BLATTNER, *Clerk,*
By G. R. BUTLER,
Deputy Clerk.

(Title of Court and Cause.)

Minute Order Sustaining Demurrer to Supplemental Complaint.

MONDAY, *October 12th,* 1891.

In this action the motion for leave to amend and the demurrer to supplemental complaint having been heretofore submitted

44 to the court for consideration and decision, and now the court being fully advised in the premises, it is ordered that the said motion be and the same is hereby granted, and it is further ordered that the demurrer to supplemental complaint be and the same is hereby sustained.

(Title of Court and Cause.)

Demurrer to Amended Complaint.

Now comes the defendant, John Brickell, (not waiving, but insisting on his motion to strike out plaintiff's amendment to his original complaint on file herein) and demurs to said amendment for matters appearing on the face thereof, and specifies as grounds of said demurrer the following, to wit:

First. That said amendment does not separately, or as to be read in, or being, or considered as being part of plaintiff's original complaint in this action state facts sufficient to constitute or assist or attend to constitute a cause of action.

Second. That said amendment is ambiguous, unintelligible, and uncertain in this.

1. It is ambiguous, because it cannot be ascertained from the amendment taken in connection with the complaint as unamended, and on which the trial was had, whether it is intended in said amendment to allege that plaintiff was, and is vested with title to the land he claims herein, together with his mother, codefendant with
45 said Brickell, by virtue of the said act of Congress as therein averred, or was or is otherwise entitled thereto by his alleged heirship to John H. Baker, and the fraud alleged to have been practiced on plaintiff by his mother in getting the city deed to herself and thereby frauduiently acquiring a deed in trust for plaintiff which she has ever refused to fulfill.

2. It is unintelligible in that the amendment claims that plaintiff and Maria Baker Batchelder, defendant, his mother, by her alleged fraudulent acts acquired, and they now hold vested rights in said property as therein claimed.

3. It is uncertain for both of the reasons stated in paragraphs 1 and 2.

4. That several causes of action have been improperly united in this.

That a cause of action is alleged against the defendant Brickell in the original complaint as holding in trust for plaintiff such interest as he claims in said complaint by reason of his heirship to John H. Baker, his father, and in the amendment to the complaint his cause of action is alleged to be joint in the whole land in controversy with Maria B. Batchelder as a beneficiary under said act of Congress, and that said act vested and still vests title in himself and said Maria Baker Batchelder.

46 Wherefore said defendant, Brickell, asks that said amendment be dismissed and stricken out.

E. J. & J. H. MOORE,
Att'ys for Def't Brickell.

October 17th, 1891.

(Endorsed:) Service by copy this 17th day of October, A. D. 1891; admitted. Fox & Kellogg, att'ys for pl'ff. Filed Oct. 20, 1891. Wm. J. Blattner, clerk, by G. R. Butler, deputy clerk.

(Title of Court and Cause.)

Minute Order Overruling Demurrer to Amended Complaint.

MONDAY, *November 2d*, 1891.

In this action the demurrer of the defendants to plaintiff's amendment to complaint on file herein, having been heretofore submitted to the court for consideration and decision, and now the court being fully advised in the premises, it is ordered that said demurrer be and the same is hereby overruled with leave to said defendants to answer in ten days.

(Title of Court and Cause.)

Separate Answer of John Brickell to Amendment to Complaint.

47 Now comes the defendant, John Brickell, and answers separately the amendment to the complaint described as paragraphs IX½, and at the end of paragraph IX as follows:

This defendant denies that either the said John H. Baker or his said estate, or the administratrix thereof was, or that they or either of them was, or were at all the times, or at any of the times in the complaint stated or at all, or that they or either of them has or have ever since, or at any time since been, or that any or either of them still is or are or ever has or have, at any time been entitled to said lands or any thereof in said deed from said city and county described in said complaint, or the amendment thereto, either under or in pursuance of the terms or provisions or intentions of said act of Congress or otherwise or at all.

Denies that they or either of them was or were at all the times, or at any time or at all the beneficiaries in the premises under or by virtue of the provisions of said act of Congress, or of a legal, proper or just interpretation thereof or otherwise, or at all.

Denies that the act of Congress ever vested or still vests title in them or either or any of them, or the estate or any of them.

E. J. & J. H. MOORE,
Att'ys for Def't Brickell.

A. N. DROWN, *Of Counsel.*

Nov. 12th, 1891.

48 CITY AND COUNTY OF SAN FRANCISCO, } ss:
State of California, }

John Brickell being first duly sworn deposes and says: That he is one of the defendants named as such in the above-entitled action. That he has read the foregoing answer to plaintiff's amendment to his complaint. That said answer thereto is true of his own knowledge.

(Signed) JOHN BRICKELL.

Subscribed and sworn to before me this 12th day of November, 1891.

[NOTARIAL SEAL.] GEO. T. KNOX,
Notary Public.

(Endorsed:) Service by copy of within hereby admitted this 12 day of Nov., 1891. Fox & Kellogg, att'ys for plaintiff. Filed Nov. 14, 1891. Wm. J. Blattner, clerk, by A. J. Evans, deputy clerk.

(Title of Court and Cause.)

Findings of Fact and Conclusions of Law.

Findings.

This cause came on regularly in its order for trial on the 31st day of December, 1891, and on that and the following day was tried before the court without a jury (a jury having been expressly
49 waived by the parties), upon the complaint and amendment to complaint of plaintiff, and upon the answer and supplemental answer of defendant John Brickell, his answer to the amendment to the complaint, the default of the defendant Batchelder, and on the evidence submitted in open court.

And the court having heard all the evidence in the case, and the arguments of counsel, the case was submitted with leave to the respective counsel to file briefs thereon; and the said briefs having been subsequently filed and submitted, and the whole case having been duly considered by the court, and the court being fully advised thereon, and having heretofore, in open court, announced its opinion and ordered a judgment in favor of the defendant John Brickell, now makes the following—

Findings of Fact.

I.

That on the 10th day of July, 1860, one John H. Baker purchased of one James C. Garner a certain tract of land, including the premises in question herein, and being part of what is known as the outside lands in the city and county of San Francisco, State of California, and received a deed therefor executed by said James C. Garner, bearing date July 10th, 1860, and expressing a consideration of three hundred dollars; which said deed was acknowl-
50 edged and duly recorded on the 11th day of July, 1860.

That in the year 1860 said John H. Baker and his wife, Maria Baker (now Maria Baker Batchelder), one of the defendants herein, with their children, went upon said tract and erected a dwelling-house and other buildings and improvements thereon; and that they thereafter occupied and resided upon the said tract until the death of said John H. Baker. That said tract was then, and is still, generally known as and called the "Golden Gate ranch," and also was and is otherwise sometimes called the "Baker tract." That from and after the death of said John H. Baker, and until the

year 1870, the said Maria Baker, with a portion of her said children, continued to and did occupy and reside upon the portion of said tract which is covered by the declaration of homestead hereinafter mentioned, and the portion thereof which is described in the deed from the city and county of San Francisco to said Maria Baker, in these findings hereinafter mentioned and referred to.

II.

That said John H. Baker and Maria Baker were married on the 15th day of November, 1836. That on the 16th day of September, 1862, the said John H. Baker and said Maria Baker, being then still married and husband and wife, and so residing upon
51 said tract as aforesaid, signed and duly acknowledged a declaration in writing, wherein and whereby they did select said tract of land excepting about forty-six acres thereof, which they had theretofore conveyed and set over to various parties, and which are not involved in this suit—as a homestead, by declaring therein their intention to claim the same as a homestead. That said declaration of homestead was in due form of law, and that the same was on the 23d day of September, 1862, duly filed for record and recorded in the office of the county recorder in and for said city and county of San Francisco. That the premises and land described in said declaration were the tract of land aforesaid, but that by reason of the conveyances and transfers aforesaid, the same covered only one hundred and thirty-eight and one-half (138½) acres thereof, including all of the parcels of land described in the said city deed to Maria Baker.

III.

That said John H. Baker died in said city and county of San Francisco, State of California, on the 30th day of March, 1863, intestate, leaving him surviving his said wife, Maria Baker, now Maria Baker Batchelder, one of the defendants herein, and six children of himself and said Maria Baker, of whom the plaintiff herein was one. That said plaintiff was born on the 21st day of June, 1861.

52 IV.

That afterwards and before the making of the mortgages to the defendant Brickell in these findings hereinafter mentioned, all of the said children of said John H. Baker, except the plaintiff herein, made conveyances to their said mother, Maria Baker, of all of their respective interests and claims in and to the said lands,—some of such conveyances being so made to her as, and when she was, Maria Baker Batchelder. That the plaintiff did not make to her any conveyance whatever thereof.

V.

That the tract of land so held and possessed by the said John H. Baker at the time of his death, was described in the said declaration of homestead as follows: "Commencing at a point where Sweeney

and Baugh's east line intersects the Pacific ocean; thence south, following said line twenty-six $\frac{23}{100}$ chains; thence east seventy-three $\frac{71}{100}$ chains; thence north thirty-six degrees thirty minutes west twenty chains to Lobos creek; thence westerly along the course of said creek to the Pacific ocean; and thence along the beach of the Pacific ocean to the place of beginning, less the quantity sold to the San Francisco city water works, to wit: one hundred and fifty feet in width along and parallel with said Lobos creek; also less the quantity sold to Nathan Porter and E. D. Sawyer, to wit: ten (10) acres; and also less the quantity conveyed by deed of gift to Mary Jane Lumberg, to wit: twenty-five (25) acres." But the same was afterwards and more particularly described in the petition for administration, and in the inventory of said estate hereinafter mentioned, as follows: "Commencing at a point on the Pacific ocean, near Point Lobos, where what was then known as Sweeney and Baugh's east line intersects the Pacific ocean; running thence south along said Sweeney and Baugh's east line 26.20 chains, more or less; thence at right angles east 1,658 feet, more or less, to land formerly belonging to Mrs. Lumberg, but late of the estate of John P. Buckley; thence at right angles north forty rods, more or less; thence at right angles east one hundred rods, more or less; thence at right angles south forty rods, more or less; thence easterly along a fence there then standing to line of land formerly belonging to Porter and Sawyer, but subsequently to Nathan Porter; thence northwesterly along the westerly line of said last-mentioned tract twenty rods, more or less; to the northwest corner of said tract; thence east eighty rods, more or less, to the northeasterly corner of said last-mentioned tract; thence north thirty-six degrees 30 minutes west to a point one hundred and fifty feet south of Point Lobos creek; thence along the southerly side of said creek, and one hundred and fifty feet distant therefrom, to the Pacific ocean; thence along the shore of the Pacific ocean to the point of beginning."

53

54

That both said descriptions were intended to include the same land, and each of them does include all the several subdivisions and tracts in subdivision VIII of these findings particularly described. That the lands covered by said declaration of homestead were of the value of fifty-five hundred and forty dollars, both at the date of filing and recording said declaration of homestead, and at the date of the death of said John H. Baker, exclusive of the dwelling-house and other buildings and improvements thereon, which were at said dates of the value of fifteen hundred dollars, making the total value of said lands and improvements, at said dates, the sum of seven thousand and forty dollars.

VI.

That on the 13th day of April, 1863, Maria Baker, widow of said John H. Baker, (now Maria Batchelder, defendant herein), filed in the probate court of the city and county of San Francisco her peti-

tion for letters of administration of the estate of John H. Baker, deceased, and in her said petition described the estate as consisting of real and personal property, and that said real property con-
55 sists of the "Golden Gate ranch, the homestead of your petitioner, of the value of five thousand dollars; that all the property of the deceased was community property;" and that the petitioner and six children, of whom the plaintiff herein is described as one, were his heirs-at-law.

That afterwards such proceedings were had in said probate court in the matter of the estate of said John H. Baker, deceased, as that the said Maria Baker (now Maria Baker Batchelder) was appointed administratrix of the estate of said deceased, on the 27th day of April, 1863; and having duly qualified as such, letters of administration upon said estate were issued to her out of said probate court on the 2d day of May, 1863. That said Maria Baker was in possession as aforesaid, of the real property aforesaid, at and prior to the time when she was so appointed administratrix as aforesaid; and that she did not, as such administratrix, enter into the possession of said real property, or any part thereof. That on the 13th day of June, 1863, she, as such administratrix, made and filed in the said probate court an inventory of said estate, in which the portion of said Golden Gate ranch or Baker tract not disposed of before the death of said John H. Baker, as hereinbefore stated, was listed as a part of the estate of said deceased; but that no appraisement thereof was made at that time. That on the 26th day of October,
56 1863, the said widow made and filed in the said probate court, in the matter of said estate, a petition for a family allowance, in which she stated that she had no property whatever, and that "the property of the estate consists of the Golden Gate ranch;" and upon the hearing of said petition, an order of court was subsequently made allowing her, as and for a family allowance, the sum of one hundred dollars per month, payable out of the estate. That on September 5th, 1865, said administratrix filed a petition for leave to sell a portion of said real estate, as the property of the estate, for the purpose of paying debts and expenses of administration; and in this petition the property was also described as belonging to the estate. That under this petition such proceedings were had as that afterwards, and in July, 1867, an appraisement of said estate was made and returned to and filed in said court, in which the said property was again listed and described as the property of the estate, and appraised at the sum of thirty-three thousand dollars; and that thereafter, on the 13th day of August, 1867, pursuant to an order of the said probate court, duly given and made upon such petition, and in the matter of said estate, the said administratrix, as such, sold to William Ware twenty-six acres of said land, not including any of that described in subdivision VIII of these findings, for the sum of five thousand two hundred dollars, for which sum she after-
57 wards duly accounted to said estate. That the final account of said administratrix was filed on the 20th day of December, 1867, and settled on the 30th day of December, 1867.

That in January, 1868, said administratrix filed her petition for distribution of said estate, alleging that the whole of said land then remaining was property of the estate, and was common property, and that she was entitled to six-twelfths thereof by succession, and to three-twelfths by conveyance, and that the remaining three-twelfths thereof belonged to three children of the deceased, of whom the plaintiff herein was named as one. That an order to show cause why distribution should not be made was duly made and given, but no hearing was ever had on the application for distribution; and no further proceedings have ever been had or taken in the matter of said estate for the distribution thereof. That the administration upon the estate of said decedent has not yet been closed. That neither the widow, nor any other party or person, has ever asserted, in the course of said probate proceedings, any homestead claim to said property, or any part thereof, or made application to have any homestead set apart out of said estate, and no part thereof has ever been segregated or set apart as a homestead.

VII.

58 That afterwards, and before the making of the city deed hereinafter mentioned, or the mortgages to the defendant Brickell hereinafter mentioned, the said Maria Baker sold and conveyed a certain portion of the lands and premises hereinbefore described, part of the said Baker ranch, but not including any of the subdivisions or parts thereof hereinafter mentioned, and received in exchange therefor the lot of land situate on Bryant street, in said city and county of San Francisco, described in the complaint in this cause, and took the title thereof in her own name, claiming to hold the same in her own right, and afterwards removed to said property and resided thereon during a portion of the time prior to its finally coming into the possession of the defendant Brickell under the foreclosures of the mortgage hereinafter mentioned. That the value has not been shown either of the tract so sold, or of that so received, by the said Maria Baker. That neither the making of the exchange aforesaid, nor the taking and accepting the title to said Bryant Street property by said Maria Baker in her own name, was a fraud upon the estate or upon the heirs-at-law of said John H. Baker, deceased.

VIII.

59 That afterwards, and in the month of December, 1872, the said Baker tract and the lands composing the same having been theretofore surveyed and platted into lots and blocks, and shown and delineated upon what was then and is now commonly known and called the "outside land map," or map of the outside lands of the city and county of San Francisco, as "Mrs. J. H. Baker's tract;" the said defendant Maria Baker Batchelder, then Maria Baker, being and claiming to be in possession, and entitled to the possession, thereof in her own right, and claiming that she was the party entitled to a city deed therefor, under the act of Congress approved March 8th, 1866, entitled "An act to quiet title

to certain lands within the corporate limits of the city of San Francisco," and the statutes of the State of California, and the laws and ordinances of the city and county of San Francisco in relation thereto, in due form of law petitioned and made application to the board of supervisors of said city and county, under and in pursuance of order No. 800 of the said board of supervisors, for a grant, or what is commonly known as a city deed, for the portions of said lands in this finding hereinafter mentioned and particularly described, the same being portions of the lands hereinbefore, in finding number V, mentioned and described. That in her said petition and application, she declared under oath that she and her husband with their children originally took possession of the land,
60 built a house thereon and cultivated the land; that the fences inclosing the same were kept up by her and her family; that she and her family had been in actual possession thereof since the 11th day of July, 1860, and so continued; using therein, among others, the following words: "In short, my possession through myself has been continuous and full from July, 1860, to date." That under said application such proceedings were duly and regularly had, as that afterwards a grant was made in accordance with the prayer of said petitioner, and in pursuance of such grant, on the 9th day of January, 1873, a deed was made and executed in the usual form in such cases, by the city and county of San Francisco to the said Maria Baker, conveying to her and confirming to her the title to all the lands described in said complaint in this cause, the same being part of the said Baker ranch, to wit: the several tracts and parcels of lands bounded and described as follows, to wit:

1st. Commencing at a point on the westerly line of Twenty-fourth avenue, four hundred and sixty-two feet and seven inches (462 ft. 7 in.) northerly of California street; thence northerly thirty-six (36) feet eleven (11) inches; thence westerly two hundred and forty (240) feet to the easterly line of Twenty-fifth avenue; thence southerly on Twenty-fifth avenue sixty-one (61) feet two (2) inches;
61 thence northeasterly two hundred and forty-one (241) feet three (3) inches to point of commencement; being portion of block 95; also

2d. Commencing on the westerly line of Twenty-fifth avenue four hundred and thirty-one (431) feet three (3) inches northerly of California street; thence northerly one hundred and sixty-eight (168) feet nine (9) inches; thence westerly two hundred and forty (240) feet to easterly line of Twenty-sixth avenue; thence southerly one hundred and ninety-three (193) feet one (1) inch; thence northeasterly two hundred and forty-one (241) feet three (3) inches to point of commencement; being portion of block 96.

3d. Commencing on the westerly line of Twenty-sixth avenue, three hundred and ninety-nine (399) feet ten (10) inches northerly of California street; thence northerly two hundred (200) feet two (2) inches; thence westerly two hundred and forty (240) feet to easterly line of Twenty-seventh avenue; thence southerly on Twenty-seventh avenue, two hundred and twenty-four (224) feet five

(5) inches; thence northeasterly two hundred and forty-one (241) feet three (3) inches to point of commencement; being portion of block 97; also

4th. Block number 98 entire, bounded by Twenty-seventh and Twenty-eighth avenues, California and — streets; also

62 5th. Block number 99 entire, bounded by Twenty-eighth and Twenty-ninth avenues, California and — streets; also

6th. Block number 100 entire, bounded by Twenty-ninth and Thirtieth avenue-, California and — streets; also

7th. Block number 101 entire, bounded by Thirtieth and Thirty-first avenues, California and — streets; also

8th. Block number 102 entire, bounded by Thirty-first and Thirty-second avenues, California and — streets; also

9th. Commencing at the northwesterly corner of California street and Thirty-second avenue, thence northerly on Thirty-second avenue six hundred (600) feet, thence westerly one hundred and forty (140) feet six (6) inches, thence southeasterly six hundred and three (603) feet five (5) inches, more or less to a point on the northerly line of California street, one hundred and sixty (160) feet four (4) inches easterly from Thirty-third avenue, thence easterly on California street seventy-nine (79) feet eight (8) inches, to point of commencement; being portion of block number 103; also

10th. Commencing on the westerly line of Thirty-second avenue, two hundred and twenty-four (224) feet six (6) inches northerly from Clement street thence northerly three hundred and seventy-five (375) feet six (6) inches, to southerly line of California

63 street, thence westerly seventy-one (71) feet seven (7) inches thence southeasterly three hundred and eighty-one (381) feet two (2) inches to a point two hundred and eleven (211) feet four (4) inches easterly of Thirty-third avenue, thence northeasterly twenty-nine (29) feet eight (8) inches to point of commencement; being portion of block 150; also

11th. Commencing on the westerly line of Thirty-first avenue two hundred and fifty-six (256) feet eight (8) inches northerly from Clement street, thence northerly on Thirty-first avenue three hundred and forty-three (343) feet four (4) inches, to southerly line of California street, thence westerly two hundred and forty (240) feet, thence southerly three hundred and sixty-eight (368) feet — (2) inches, thence northeasterly two hundred and forty-one (241) feet three (3) inches to point of commencement, being portion of block 151, also

12th. Commencing on the westerly line of Thirtieth avenue three hundred and seventy-five (375) feet northerly of Clement street, thence northerly two hundred and twenty-five (225) feet to California street, thence westerly two hundred and forty (240) feet, thence southerly two hundred and twenty-five (225) feet, thence easterly two hundred and forty (240) feet to point of commencement, being portion of block 152; also

13th. Commencing on the westerly line of Twenty-ninth

64 avenue three hundred and twenty (320) feet ten (10) inches northerly of Clement street, thence northerly on Twenty-

ninth avenue two hundred and seventy-nine (279) feet two (2) inches, to California street; thence westerly two hundred and forty (240) feet, thence southerly three hundred and three (303) feet eleven (11) inches, thence northeasterly two hundred and forty-one (241) feet three (3) inches, to point of commencement, being portion of block 153; also

14th. Commencing on the westerly line of Twenty-eighth avenue, three hundred and fifty-two (352) feet eleven (11) inches northerly from Clement street, thence northerly two hundred and forty-seven (247) feet one (1) inch to California street, thence westerly two hundred and forty (240) feet, thence southerly two hundred and seventy-two (272) feet two (2) inches, thence northeasterly two hundred and forty-one (241) feet three (3) inches to point of commencement, being portion of block 154; also,

15th. Commencing on the westerly line of Twenty-seventh avenue, three hundred and eighty-four (384) feet three (3) inches northerly of Clement street, thence northerly two hundred and fifteen (215) feet nine (9) inches to California street, thence westerly two hundred and forty (240) feet, thence southerly two hundred and thirty-nine (239) feet eleven (11) inches, thence northeasterly
65 two hundred and forty-one (241) feet three (3) inches to point of commencement, being portion of block 155; also,

16th. Commencing at a point six hundred (600) feet northerly of California street and ninety-nine (99) feet six (6) inches easterly of the easterly line of Twenty-third avenue, thence north nine (9) degrees, west six and two-elevenths ($6\frac{2}{11}$) chains, thence north seven (7) degrees, west five and nineteen-hundredths (5.19) chains to the Pacific ocean, thence following along the shores of the Pacific ocean south seventy-eight and one-quarter ($78\frac{1}{4}$) degrees east, three and ninety-five hundredths (3.95) chains, thence north fifty and three-quarters ($50\frac{3}{4}$) degrees east, sixteen and forty-two hundredths (16.42) chains, thence north eighty-eight (88) degrees, east five and eighty-eight hundredths (5.88) chains, thence north four and one-half ($4\frac{1}{2}$) degrees, east sixty-four (64) links, thence north fifty-nine and one-quarter ($59\frac{1}{4}$) degrees, east seventy-nine (79) links, thence south fifty-nine and three-quarters ($59\frac{3}{4}$) degrees, east eighty links, thence north sixty-nine and three-quarters ($69\frac{3}{4}$) degrees, east one and eighty-hundredths (1.80) chains, thence north eighty-three and three-quarters ($83\frac{3}{4}$) degrees, east seventy-six (76) links, thence south seventy-nine and one-quarter ($79\frac{1}{4}$) degrees, east one and forty-one hundredths (1.41) chains, thence north forty-six and three-quarters
66 ($46\frac{3}{4}$) degrees, east five and eleven-hundredths (5.11) chains (leaving shore at this point) thence south seventeen (17) degrees, east thirteen and three-hundredths (13.03) chains, thence south twenty-five and three-quarters ($25\frac{3}{4}$) degrees, east twelve and fifty-five hundredths (12.55) chains to a point six hundred (600) feet north of California street, and twenty (20) feet east of the west line of Twenty-fourth avenue, thence south eighty-six (86) degrees, forty (40) minutes, west two thousand six hundred and twenty-five (2,625) feet more or less to the point of commencement; containing 63.71 acres.

That said deed was afterwards, to wit: on the 13th day of October, 1873, duly recorded in the office of the county recorder of the said city and county of San Francisco, in Liber 721 of Deeds, at page 127 thereof, and following. That said Maria Baker did not, at the time of making said application for, or at the time of obtaining, said deed wrongfully or fraudulently, or otherwise or at all, conceal any fact as to her possession of any of said lands, nor did she wrongfully or fraudulently, or falsely claim or pretend that she was in possession or entitled to the possession thereof, in her own right, and was the party entitled to a city deed therefor under the act of Congress, statutes and ordinances aforesaid; nor did she otherwise than justly in her own right petition for and obtain the said grant and deed from said city and county.

67 That the cost of procuring said title from said city and county was not, nor was any part thereof, nor was the cost of the management and care of said property, or any part thereof, paid by, or out of, the estate of said John H. Baker, deceased. That the money wherewith to pay the outside land tax levied upon the said property conveyed by said city deed, amounting to more than $10,000, was raised by said Maria Baker by executing her personal note and her individual mortgage upon said lands to Maurice Dore; and that the indebtedness evidenced by said note and mortgage was afterwards paid by said defendant Brickell out of the moneys advanced and loaned by him to said Maria Baker, upon, and at the time of the execution of the mortgages hereinafter mentioned.

IX.

That afterwards, to wit: on the 21st day of May, 1873, the said Maria Baker intermarried with one David F. Batchelder.

X.

That afterwards, and on the 1st day of June, 1874, the said defendant Maria Baker Batchelder borrowed and received from said defendant John Brickell the sum of $36,000, in U. S. gold coin; and that, to secure the repayment of the same, she made, exe-

68 cuted and delivered to said Brickell her promissory note, bearing date on said last-named day, in which her said husband David F. Batchelder joined, and a mortgage of even date with said promissory note, in which her said husband also joined, upon all the lands hereinbefore described in finding VIII hereof; that the entire negotiations and arrangements for said loan, and for the subsequent loan hereinafter mentioned, were made with said Maria Baker Batchelder, and that no negotiations therefor were had with, and that no part of the moneys advanced by said Brickell at any time was loaned or paid to, the said husband of said Maria Baker Batchelder. That the value of said lands so mortgaged was not, at the time of the execution of said mortgage, the sum of $200,000, or more; that the value of said lands at that time has not been proven nor were the said lands, or any part thereof, at the time of the execution of said mortgage, or at any other time, the property of the

estate, or of the heirs-at-law, or any or either of them, of said John H. Baker, deceased, but the same were, and all thereof were, the separate and individual property of said Maria Baker Batchelder.

That afterwards, to wit: on the 13th day of October, 1875, and on the 20th day of February, 1877, said defendant Maria Baker Batchelder did borrow and receive from said defendant John Brickell,
69 further and additional sum- of money, which together with said sum of $36,000, amounted in the aggregate to the sum of $42,500, in the gold coin aforesaid; and to secure the payment of said additional sums did make, execute and deliver to said Brickell (her said husband David F. Batchelder joining with her) two other promissory notes and two further mortgages upon all of the said lands hereinbefore mentioned and described in said finding VIII; that each of said three mortgages also covered the lot on Bryant street in said city and county of San Francisco, which is described in the complaint herein, and a certain other lot of land situate within said city and county of San Francisco, which is not included in said city deed, but which was included in the decree of foreclosure and sheriff's deed hereinafter mentioned, to wit: that certain lot, piece or parcel of land situate, lying and being in the city and county of San Francisco, State of California, and bounded and particularly described as follows, to wit:

Beginning in the center line of Twenty-fifth (25th) avenue if continued north, distant one thousand three hundred and twenty (1,320) feet north of the northerly line of California street; thence at right angles easterly one hundred and eighty-five (185) feet, more or less,
70 to the west boundary of the Spring Valley Water Company's lands; thence north six and one-half degrees west (N. $6\frac{1}{2}°$ W.) eighty-seven (87) feet, north forty-three and three-quarters degrees east (N. $43\frac{3}{4}°$ E.) one (1) chain. North nine degrees east (N. 9° E.) two (2) chains, north thirty-four and three-quarters degrees east (N. $34\frac{3}{4}°$ E.) two and forty-five one-hundredths (2.45) chains, north three degrees west (N. 3° W.) two and ninety-five one-hundredths (2.95) chains, north seventy-nine degrees west (N. 79° W.) three and thirty-three one-hundredths (3.33) chains, north forty-nine and three-quarters degrees west (N. $49\frac{3}{4}°$ W.) two and eighty-seven one-hundredths (2.87) chains, north ten degrees west (N. 10° W.) three (3) chains, north fifty-six and one-half degrees west (N. $56\frac{1}{2}°$ W.) one and twenty-hundredths (1.20) chains, south forty-six and three-quarter- degree west (S. $46\frac{3}{4}°$ W.) three and forty-eight one-hundredths (3.48) chains, south seventeen degrees east (S. 17° E.) thirteen and three one-hundredths (13.03) chains, south twenty-five and three-quarters degrees *each* (S. $25\frac{3}{4}°$ E.) forty-one (41) feet to a point one thousand three hundred and twenty (1,320) feet north of the northerly line of California street if measured perpendicular; thence easterly, parallel to California street, twenty-one (21) feet, more or less, to the place of beginning, the same being the same parcel of land which is mentioned and described in the description numbered 17, which is contained in the complaint
71 herein; and also certain lands situate in the county of Alameda, in said State of California; and that each thereof was

duly recorded. That in all of her negotiations with said defendant Brickell for the said loan, said defendant Maria Baker Batchelder represented, insisted, asserted and claimed that she was individually the absolute owner, and alone the owner, of said property, and of the whole thereof.

That afterwards and on the 25th day of June, 1878, said defendant John Brickell, as plaintiff, commenced an action in the district court of the 23rd judicial district of the State of California, in and for the said city and county of San Francisco, against the said Maria Baker Batchelder and David F. Batchelder, her husband, as defendants, for the foreclosure of the said three several mortgages. That in said action such proceedings were thereafter regularly and duly had as that afterwards, and on the 26th day of November, 1878, a judgment and decree of foreclosure was duly given, made and entered in said cause by said court in favor of the said plaintiff therein and against the said defendants therein; that under and pursuant to said decree and execution regularly issued thereon, all of the said real property described in and conveyed by said mortgages (excepting the portions thereof theretofore duly released by said Brickell from the lien of said mortgages, and which
72 are hereinafter particularly described and mentioned as so released) was, in due course and form of law, regularly sold by the sheriffs of the respective counties wherein the same are situated; that that part of said real property which was situate in said city and county of San Francisco, including all of the parcels of land described in finding VIII hereof, was sold to, and bid in by, the said defendant, John Brickell; that thereafter and on the 15th day of July, 1879, no redemption from said sale having been made, and the time for such redemption having expired, the sheriff of said city and county of San Francisco, pursuant to the sale aforesaid, duly and regularly executed and delivered to said Brickell his deed for the whole of said lands so sold to, and bid in by, him as aforesaid, and said Brickell thereupon and under said deed entered into the possession of the same, and of the whole and every part and parcel thereof, excepting the two parcels thereof which are in this finding hereinafter mentioned and particularly described, the same having been before said foreclosure and sale duly released of record from the lien of said mortgages. That said Brickell did then take, and ever since then has held and kept, actual and exclusive possession of said lands, and every part thereof (not so released as aforesaid), and did then exclude, and ever since
73 then has excluded, and does now exclude, the plaintiff therefrom, and has ever since the date of said sheriff's deed denied, and does now deny, that the plaintiff has, or is entitled to, any estate, right, title or interest therein, or to the possession thereof, either jointly with himself or otherwise, or at all, and has ever since the date of said deed claimed, and does still claim, to be, and that he is, the full and sole owner of said lands, and of every part thereof and of the whole thereof (not so released as aforesaid), and of every estate and interest therein, to the exclusion of plaintiff and all other persons.

That said defendant John Brickell did not commence or prosecute the said suit of foreclosure with, or in pursuance of, any intent to cheat or defraud the plaintiff herein, or with any other intent than to obtain his just and legal and equitable rights in the premises; that the said lands were not bid in at the said foreclosure sale by the said Brickell for less than one-half of, or for anything less than, the real and true value thereof; and that said defendant Brickell has not at any time wrongfully or fraudulently claimed, nor did he at the time of the commencement of this action, nor does he now, wrongfully or fraudulently claim to be the owner of said property; but, on the contrary, he has and does rightfully claim to be, and he is, the owner of said lands, and of every part thereof, and of the whole thereof, under and by virtue of
74 such foreclosure sale and deed. That the defendant Brickell did not, on or about the 1st day of January, 1880, or at any other time, wrongfully take possession of said property, or of any part thereof, or wrongfully oust or eject the plaintiff herein therefrom; nor has he at any time wrongfully kept, nor does he now wrongfully keep, the plaintiff herein ousted or ejected therefrom; nor has he at any time wrongfully denied, nor does he now wrongfully deny, that said plaintiff has any right, title or interest therein to plaintiff's damage in the sum of $10,000, or in any sum whatever.

Said parcels so released as aforesaid from the lien of said mortgages are described as follows:

1st. Beginning at a point in the easterly line of Twenty-fourth avenue, distant 469 feet 8 inches north of the northerly line of California street; thence northerly 170¼ feet; thence westerly at right angles 35 feet; thence northerly along the center line of Twenty-fourth avenue (if continued north), 565 feet to the southerly line of lands belonging to the Spring Valley Water Company; thence north 84¾ degrees west 125 feet, thence north 6½ degrees, west 94 feet more or less to a point distant 1,320 feet north of the northerly line of California street if measured perpendicular, thence westerly parallel to California street 185 feet more or less to the center
75 line of 25th avenue (if continued northerly) thence along the centre line of 25th avenue southerly 720 feet, thence easterly at right angles 35 feet to the northwest corner of block 95, thence along the east line of 25th avenue; southerly 161 and eight-twelfths feet to the northerly line of Jeremiah Buckley's tract, thence along said Buckley's line north 81 degrees 15 minutes east, 307 feet to beginning.

2d. Commencing on the westerly line of 25th avenue at a point distant 475 feet northerly from the north line of California street, thence northerly on said westerly line of 25th avenue, 125 feet, to the northeasterly corner of block 96 of the so-called Baker tract, thence at right angles westerly and along the north line of said block 240 feet to the *the* easterly line of 26th avenue, thence southerly along said line of 26th avenue 125 feet and thence at right angles easterly 240 feet to beginning. Being north part of block 96.

XI.

That the value of the use and occupation of the one-twelfth part of the property and premises described in subdivision VIII of these findings, since the 1st day of January, 1880, has not been proved.

XII.

76 That the said defendant John Brickell did not, at the time of the death of said John H. Baker, or at all the time from thence to the commencement of this action, or at any time, well or at all know, or have full or any knowledge, that said John H. Baker died, seized or possessed of the real property, or any thereof, in the complaint herein mentioned and described, or that the same, or any of it, or any part thereof, was of the estate of said John H. Baker, deceased. That said defendant John Brickell did not, at the time of the execution to him of the notes and mortgages hereinbefore referred to, know of the existence of the plaintiff herein and of the several children of the said John H. Baker, deceased. That said defendant Brickell did not, at the time of the execution, or at any time prior to the execution, to him of said notes and mortgages, know of the appointment of the said Maria Baker as administratrix as aforesaid; or of the making and filing of the inventory aforesaid; or of the jurisdiction attempted to be exercised by the court over the real property described in said inventory, or of the sale of a portion thereof under the order of the court, or of the application of the proceeds of such sale to the payment of the expenses of administration and of claims against the estate of said John H. Baker, deceased; and that all knowledge that said defendant Brickell has at any time had of the matters connected with
77 the administration of said estate, has been such as he has subsequently derived from the abstract which was made and placed in the hands of, and examined by, the attorneys of said Brickell, at the time of the application by said Maria Baker Batchelder for the loans aforesaid, and the various continuations thereof.

That said defendant John Brickell did not at any time, well, or at all, know, or have full or any knowledge, that the real property described in subdivision V of the complaint herein, or any part thereof, or that the real property included in the mortgages aforesaid, or any part thereof, was acquired or received by the said Maria Baker in exchange for a portion of the outside lands, or of any lands belonging to said estate; or that the title thereto, or to any part thereof, was acquired or held by her in trust for said estate, or for the heirs-at-law of said deceased, or either or any of them; or the title acquired through or under said deed of January 9th, 1873, was acquired or held in fraud of the rights of said estate, or of the heirs-at law, or any or either of them, of said deceased; and that said defendant John Brickell did not take or accept said mortgages, or any thereof, with full or any knowledge of all or any of the alleged facts in plaintiff's complaint set forth, except as herein stated and found.

78 XIII.

That on the 13th day of May, 1876, said Maria B. Batchelder, defendant herein, brought her action as plaintiff in the then district court of the fourth judicial district of the State of California, in and for the said city and county of San Francisco (which said suit was numbered therein 20431), against the plaintiff herein Adam S. B. Baker, as defendant, to quiet the title of her, the said Maria Baker Batchelder, to the whole of the premises in controversy in this action, being the several parcels and lots of land which are described in finding VIII hereof, against the plaintiff herein, and against all adverse claim and pretense of title thereto of the said plaintiff herein; and that such proceedings were afterwards regularly and duly had in said action, that the judgment and decree of said court was duly rendered, given and made therein on the 15th day of August, 1876, in favor of the said plaintiff therein (said Maria Baker Batchelder, defendant herein), and against the said defendant therein (said Adam S. B. Baker, the plaintiff herein), wherein and whereby it was adjudged and decreed that the said Adam S. B. Baker had, and has, no estate, right, title or interest in or to the said lands, or any part thereof, that the said Maria Baker Batchelder was and is

79 the owner of said lands, and the whole thereof, and had and has good and valid title thereto, and to the whole thereof, and that said Adam S. B. Baker should be, and was, forever, enjoined from setting up or asserting any claim, estate or interest therein; that said cause was afterwards duly transferred to this court and assigned to department No. 7 thereof; and that said judgment and decree was on the 23d day of January, 1886, duly entered in the judgment book and records of this court; that the said judgment and decree has never been reversed, but has become and is final; that on appeal therefrom by said Adam S. B. Baker to the supreme court of this State, said judgment and decree was fully and in all respects affirmed by said supreme court, and that the judgment of said supreme court in said cause was duly remitted and certified to this court, and that the remittitur therein was duly attached to the judgment-roll in said cause, and entered on the docket of this court, on the 26th day of June, 1889.

That said defendant John Brickell did not, on the said 13th day of May, 1876, or at any other time, contrive or intend to cheat or defraud the plaintiff herein, and that said defendant did not, on said 13th day of May, 1876, or at any other time, either with intent to cheat or defraud the plaintiff, or otherwise, or at all, retain counsel to bring the said suit, or procure or cause said suit to be

80 brought, either in the name of said defendant Maria Baker Batchelder as plaintiff, or otherwise, or at all; or cause the complaint, or any complaint, in said action to be filed; or have any connection with, or any agency whatever in, bringing said action, or in causing it to be brought, or in any of the proceedings which were at any time had or taken therein. That said defendant John Brickell did not fraudulently, or otherwise, or at all, procure summons, or any summons, to be issued upon said com-

plaint, or to be afterwards, or at any time, returned, either with or without the, or any, affidavit of one George Martin, or of any other person, endorsed thereon or affixed thereto, or otherwise, or at all.

That the summons in said action was duly and regularly issued therein on the said 13th day of May, 1876; and was on said last-named day duly and personally served at said city and county of San Francisco upon said Adam S. B. Baker, who was named a defendant therein; and that due proof was made of such service of said summons. That it is not true, as averred in the complaint herein, that the plaintiff herein never had any knowledge that such or any action had been commenced against him, or of any proceedings therein, until in or about the month of May, 1885, or until he first learned thereof through his counsel, Messrs. Fox & Kellogg, or that he first, or at any time, learned thereof through his counsel,

81 Messrs. Fox & Kellogg, either when they were examining into his title to the premises aforesaid, or at any other time.

That said Adam S. B. Baker duly appeared in said action, as in like cases provided by law, through his guardian *ad litem*, regularly appointed therein; and that said district court acquired and had full jurisdiction over the person of said Adam S. B. Baker, to make and enter in said action its said judgment and decree therein against him.

That said defendant John Brickell did not, either with intent to cheat or defraud the plaintiff herein, or otherwise or at all, retain or procure counsel to appear for or on behalf of the now plaintiff as defendant, or for any purpose whatever, in said action; and that no counsel procured or paid by said defendant Brickell did so appear. That none of the proceedings in said action were fraudulent, or were had or done with intent to cheat or defraud the plaintiff herein; nor was the whole or any part of said action instituted or conducted, on both sides or on either side, or at all, by the procurement of said Brickell, or at his expense. That said action was brought by said Maria Baker Batchelder alone, and that the institution of said suit, and all proceedings had or taken therein, were at and by her sole instance and procurement and at her expense; that said suit was not, nor were the proceedings therein, or any thereof, fraudulent, or done or taken with any intent to cheat or defraud the plaintiff herein.

82 XIV.

That none of the allegations of the complaint are true which charge the defendant, John Brickell with fraud, or intent to cheat or defraud; or which charge him with knowledge of fraud committed by Maria Baker, now Maria Baker Batchelder.

XV.

That none of the premises in dispute were ever acquired or held by Maria Baker, now Maria Baker Batchelder, in trust for the estate, or for any heir-at-law, of John H. Baker, deceased.

XVI.

That at the time of the commencement of this action, three years had not expired since the plaintiff herein had attained his majority.

Conclusions of Law.

I.

That said John H. Baker was not, at the time of his death, or at any other time, the owner of the tracts or parcels of land in the complaint herein described, or of any part thereof.

II.

That upon the death of said John H. Baker on the 30th day of March, 1863, under and by virtue of her homestead right, the said Maria Baker (now Maria Baker Batchelder, defendant herein) became and was seized in fee by survivorship of the whole
83 of the said Baker tract or Golden Gate ranch, so far as any right, title, interest or estate therein had theretofore existed in said John H. Baker and his said wife Maria Baker, or either of them, free from any rightful claim by any heirs-at-law of said John H. Baker, or by his estate.

III.

That no portion of said Baker tract or Golden Gate ranch, nor any interest therein, at the time of said John H. Baker's death, passed by succession to the plaintiff, or to any of said Baker's heirs-at-law, nor did it, or any part thereof, become subject to the administration of his estate. That no portion of the premises in dispute ever became part of the estate of said John H. Baker, deceased. That neither said estate nor said heirs-at-law, nor the plaintiff, has ever at any time had any right, title or interest in the premises in controversy herein, or in any part thereof. That the plaintiff is not, nor has he ever been, the owner, or entitled to the possession, of any portion of the premises described in the complaint herein.

IV.

That neither the said John H. Baker, nor his estate, nor the administratrix thereof, was, or were, at any of the times in the complaint herein stated, nor at any time since, nor are they, nor
84 any of them, entitled to the lands, or any thereof, in the deed from the city and county of San Francisco described, under or in pursuance of the terms, provisions, or intention of the act of Congress referred to in the complaint herein; nor were they or any of them ever at any time, nor are they or any of them now, the beneficiaries or beneficiary under or by the provisions of said act of Congress, or a legal, proper or just interpretation thereof, nor did the said act vest any title in them, or any or either of them.

V.

That the title to the property on the southeasterly line of Bryant street, which is mentioned and described in the complaint herein, which was acquired by said defendant Maria Baker Batchelder was not received nor held, nor has the same ever since been held, nor is it now held, in trust for the benefit of the heirs-at-law of said John H. Baker, deceased or of the plaintiff herein, as an heir-at-law of said decedent; and that plaintiff was not at the commencement of this action, nor is he now, entitled to share therein to the extent of one undivided one-twelfth part of the whole thereof, or to any extent whatever.

VI.

That the procuring and taking of said deed from the city and county of San Francisco by said Maria Baker in her own
85 name, was not a fraud upon the estate, or upon the heirs, or any of them, of the said John H. Baker, deceased; and that the title thereby acquired by her was not, nor was any part thereof, taken, received or held by her, nor has the same ever since, or at any time, been held by her, nor was the legal title to said lands described in said deed acquired by, and standing of record in the name of said Maria Baker, afterwards Maria Baker Batchelder, at any time taken, acquired or held by her, in trust for the estate, or the heirs-at-law, or any of the heirs-at-law, of said decedent (or their grantees, or any of them), or for the plaintiff herein; and that plaintiff is not, and was not at the commencement of this action, entitled to share therein to the extent of one undivided one-twelfth part thereof, or to any extent whatsoever, or at all.

VII.

That by virtue of the actions, conveyances or proceedings alleged in the defendant Brickell's answer, he became, and is still, the owner and in possession of all the lands and premises in controversy herein.

That the plaintiff is, by said actions, conveyances and proceedings, forever barred and estopped to prosecute the present action. That the action and proceeding in foreclosure, alleged in the complaint and also in the answer herein, is such bar and
86 estoppel; as also is the action No. 20431 by said Maria Baker Batchelder against said Adam S. B. Baker, the present plaintiff.

VIII.

That the plaintiff is not entitled to recover the land and premises, or any thereof, sued for, and by him claimed, in his complaint; nor any interest or proportion therein or thereof; nor was the plaintiff damaged by any act of said Brickell; nor is he, the plaintiff, entitled to any relief whatsoever herein.

IX.

That the defendant John Brickell is entitled to judgment and decree in this cause against the plaintiff, Adam S. B. Baker, as prayed for in his answer, and to be hence dismissed with his costs in this action.

Let judgment and decree be entered accordingly.

Dated June 16th, 1892.

JOHN HUNT, *Judge.*

(Endorsed:) Due service of the within findings at San Francisco, this 2d day of June, A. D. 1892, is hereby admitted. Fox & Kellogg, attorneys for pl'ff. Filed June 17th, 1892. Wm. J. Blattner, clerk, by J. J. Grief, deputy clerk.

87 (Title of Court and Cause.)

Decree.

This cause having heretofore been tried upon the pleadings, and the evidence, oral and documentary, given in open court, and the court having thereafter rendered its decision thereon, and made and filed its findings of fact and conclusions of law, and being now fully advised in the premises, it is by the court, in consideration of the law and the premises, ordered, adjudged and decreed, that the plaintiff, Adam S. B. Baker, has not and never has had, any right, title or interest in the land and premises in dispute or in any thereof. That he has not suffered any damage by the acts, or any of them, of defendant John Brickell, alleged in complaint, nor is he the plaintiff entitled to any relief whatsoever herein. It is further ordered, adjudged and decreed, that the said defendant John Brickell, be hence dismissed with his costs herein expended, taxed at $171.50.

Dated June 16th, 1892.

JOHN HUNT, *Judge.*

Recorded June 17th, 1892, Book 17 of Judgment page 34.

87½ (Title of Court and Cause.)

Certificate to Judgment-roll.

CITY AND COUNTY OF SAN FRANCISCO, *ss:*

I, Wm. J. Blattner, county clerk of the city and county of San Francisco, State of California and *ex officio* clerk of the superior court, do hereby certify the foregoing to be a true copy of the judgment entered in the above-entitled cause and recorded in Judgment Book 17 of said court at page 34. And I further certify that the foregoing papers hereto annexed constitute the judgment-roll in said cause.

Witness my hand and seal of said superior court this 17th day of June, A. D. 1892.

WM. J. BLATTNER, *Clerk*,
[SEAL.] By JNO. P. RICE, *Deputy Clerk*.

(Title of Court and Cause.)

Plaintiff's Statement on Motion for New Trial.

88 This cause came regularly on for trial in its order before the court on December 31st, 1891, Messrs. Fox & Kellogg appearing for plaintiff, and Messrs. E. J. & J. H. Moore for defendant Brickell, a jury having been waived in manner according to law. The default of the defendant Batchelder was duly taken and entered.

The plaintiff, to sustain the issues on his part, offered, and there was admitted in evidence deed of grant, bargain and sale made by James C. Garner to John H. Baker, dated July 10th, 1860, and duly acknowledged on the 11th day of July, 1860, so as to entitle the same to be recorded, and duly recorded in the office of the county recorder of the city and county of San Francisco, State of California, on said last-named day, conveying the tract of land in said city and county, for the consideration named of three hundred ($300.00) dollars, being part of what is now known as the outside lands, and being, after such deed, known as the "Baker tract," and sometimes also called the "Golden Gate ranch," and conveying all the property in this controversy, besides other lands.

Plaintiff next offered and there *was* admitted in evidence, successively, the following papers and records, being portions of the proceedings taken and had in the former probate court of the said city and county of San Francisco, in the case entitled "In the matter of the estate of John H. Baker, deceased," No. 1552, commenced
89 and instituted April 13th, 1863, to wit: the petition of Maria Baker (now Batchelder, a defendant herein), then widow of John H. Baker, deceased, for letters of administration upon the estate of the latter, filed April 13th, 1863.

Mr. MOORE: We object to the admission of that paper, upon the ground that the same is irrelevant, incompetent and immaterial to prove any interest or estate in John H. Baker or in the plaintiff in or to the lands in question, or to establish any trust, or to work an estoppel on the defendant.

The court overruled the objection, to which ruling the defendant Brickell, by his counsel, duly excepted.

It was thereupon stipulated by counsel that all the testimony which should be offered by plaintiff and admitted by the court consisting of any of the papers or proceedings in said probate court in the matter of the estate of John H. Baker, deceased, and also all testimony concerning matters prior to the date of the application for the city deed, shall be considered as offered, subject to the same objections and grounds of objection made by defendant Brickell to the offer and admission of said petition for letters of administration,

and with like effect as though objection were made and exception taken to each offer and admission, and to each ruling thereon.

90 Said petition of Maria Baker is as follows:

"In the Probate Court of the City and County of San Francisco.

In the Matter of the Estate of JOHN H. BAKER, Deceased.

To the Hon. M. C. Blake, probate judge of the city and county of San Francisco:

The petition of Maria Baker, widow of deceased, respectfully showeth:

That John H. Baker died in the city and county of San Francisco, State of California, on the thirtieth day of March, A. D. 1863; that said deceased at the time of his death, and for a long time previous thereto, was a resident of the said city and county of San Francisco, and that he has left an estate in said city and county, consisting of real and personal property, and within the jurisdiction of this court; that said real estate consists of the 'Golden Gate' ranch, of the value of about five thousand dollars, the same being the homestead of your petitioner, and the personal property of the value of one hundred dollars.

That due search and inquiry have been made to ascertain if deceased left any will and testament, but none has been found, and according to the best knowledge and belief of your petitioner said deceased died intestate.

91 That all of the aforesaid property and all the property of which deceased died possessed or entitled to, was common property.

That the only heirs-at-law of said deceased, are your petitioner and the children of deceased and your petitioner, to wit:

Mrs. Catherine F. Whelan, aged 35 years, and wife of Peter Whelan.

Mrs. Mary Jane Lundberg, aged 24 years, and wife of Theodore Lundberg.

Mrs. Mary E. Scott, aged 23 years, and wife of William G. Scott, all with their respective husbands, residing in this city and county; and also the minor children, residing with your petitioner on said ranch, viz: John H. Baker, Jr., aged 19 years; Appelonia Baker, aged 7 years; and Adam S. B. Baker, aged 19 months.

Wherefore your petitioner prays that a day of court may be appointed for hearing this application; that due notice thereof be given by the clerk of this court by posting notices according to law, and that upon such hearing and the proofs to be adduced, letters of administration upon said estate be issued to your petitioner, and that such further orders be made as may be proper in the premises.

PORTER & SAWYER,
Att'ys for Petitioner.

April 13th, A. D. 1863."

92 Plaintiff then offered and there *was* admitted in evidence the following documents filed in said cause in said estate, all in due and legal form, to wit: Order of posting of notice of said petition of Maria Baker, dated April 13th, 1863; proof of such posting by affidavit dated April 17th, 1863; order of court appointing Maria Baker administratrix, dated April 27th, 1863; letters of administration to Maria Baker, dated May 2d, 1863; order for publication of notice to creditors, dated May 1st, 1863; affidavit of publication of same, dated March 18th, 1864; decree of due publication of same dated March 18th, 1869; inventory of said estate, dated June 13th, 1863, in which the said Baker ranch or Golden Gate ranch was listed and described as part of the estate of said deceased and, in said inventory, said ranch was described as consisting of 220 acres, more or less, of land. Three appraisers were appointed by the court, to wit: Peter Whelan, Frieland Holmes and W. L. Crowell, and two of those names are signed to an appraisal, but said appraisal was not by either of them verified, and plaintiff specially excepted said appraisal from the offer in evidence of said inventory.

Mr. MOORE: We will add to the objection made before that the inventory should be offered and admitted and read in evidence as a whole, or not at all.

93 The court admitted in evidence said inventory with the exception of said appraisement. Petition, filed October 26th, 1863, by said Maria Baker for family allowance, in which petition she stated that she had no property whatever, and that the property of the estate consisted of the Golden Gate ranch; order of court, subsequently made on said petition, allowing said Maria a family allowance in the sum of one hundred dollars per month, payable out of the estate; annual account and report of said Maria as such administratrix, in which said ranch is accounted for as property of the estate; verified petition of said Maria as administratrix, filed September 5th, 1865, praying for leave to sell a portion of said real estate as the property of said estate for the purpose of paying debts and expenses of administration and describing said property as belonging to the estate; inventory and appraisement, made July 19th, 1867, in which said real estate was described as property of the said estate, and was reappraised at the sum of $33,000; order of court dated August 13th, 1867, for the sale of 26 acres of said real estate to William Ware for the sum of $5,200; subsequent account of said administratrix filed December 20th, 1867, in which she accounted for said $5,200; order of court confirming said sale, filed September 9th, 1867; final account of said administratrix, dated and filed December 20th, 1867, in which said Maria, as such administra-

94 trix, accounted for and charged herself with all said ranch, not so sold to said Ware, as the property of said estate; report accompanying said account, decree of said court, dated December 20th, 1867, and filed December 30th, 1867, settling said final account as rendered; petition for distribution signed by said Maria as such administratrix, dated January 13th, 1868, setting forth that the whole of said ranch remaining was the property of said estate,

and stating that it was common property and that she was entitled to six-twelfths thereof by succession and three-twelfths by conveyance, and that the remaining three-twelfths belonged to three of the children of deceased, one of which last-named children is the plaintiff; order of court, dated January 13th, 1868, to show cause why distribution of said estate should not be made in accordance with the prayer of said petition; but no further proceedings were taken in said matter and no distribution ordered and no distribution has yet been had in said estate.

Plaintiff then offered and there were admitted in evidence deeds showing that John H. Baker and Maria, his wife, on September 16th, 1862, conveyed out of said ranch to N. Porter and E. D. Sawyer ten acres of said tract, in severalty, by particular description; and, about the same time, conveyed eleven acres of said ranch to the San Francisco water works; and, on the 22d of Sep-
95 tember, 1862, conveyed twenty-five acres of said ranch to Mary Jane Lundberg. The several tracts of land thus conveyed are not involved in this suit.

Plaintiff next put in evidence the testimony of Mrs. C. B. WARE, taken by deposition and read on the former trial, which is as follows:

John H. Baker was my father. He is dead. He died March 30th, 1863. I know the Baker tract; the land in controversy in this suit is a part of that tract. He lived on the Baker tract, and had a dairy there till his last sickness, when he came to my house to be near and handy to the doctor. He died at my house. I know the plaintiff. He was about nineteen months old when my father died, March 30th, 1863. We children all lived on the ranch after my father died. My mother traded some of the land for the Bryant Street property, and came into the city for a while. Adam was with her and the rest of the family till she moved away. I stayed with mother to keep her company, because she was lonesome.

On cross-examination witness testified:

I was married in 1863. My father died in 1863. He had sold his cattle about three months before his death. Adam was born August 21, 1861.

96 MARIA BAKER BATCHELDER, called for plaintiff, sworn, testified:

I was the wife of John H. Baker. I was married to him in Baltimore, Maryland, in 1836. He came to California in 1856 or 1857, and I in 1859. I know the property in dispute in this action. It was a part of a tract of 255 acres which my husband claimed, and which was generally known as the "Golden Gate ranch," sometimes called the Baker ranch. In July or August, 1860, he went to live on this "Baker tract." He had a dairy ranch there; raised stock, drove a milk wagon, raised potatoes, occupying whole ranch up to his death. I had no separate property. My husband bought of Garner and himself paid for the land. I had no separate property. He occupied the whole tract, paid taxes on it, and had possession

The witness, Mrs. BATCHELDER, continued her testimony as follows:

I was appointed administratrix of the estate. I lived on the property after my husband's death till 1870 or 1871. I raised stock, had a dairy ranch there, and chickens, and tried to make the best living I could upon it. My husband died in 1863, and I was married to Mr. Batchelder in 1873. I got the city deed from the city and county of San Francisco for some of that property January 9, 1873. My husband left six children. The plaintiff was one of them, and was two years old on June 21st, 1863. He lived with me on the property after my husband's death. He has always lived with me. I paid the taxes on the ranch. Mr. Ware first paid them and I paid him out of the estate, from property of the estate he bought at the probate sale. All our expenses came out of lands of the estate sold to pay them. The $100 per month, family allowance, was paid in the same way. When my husband went on the property he built barn, fences and house.

Cross-examination:

On cross-examination the witness said:

102 We were married on the 15th of November, 1836. The ranch was taken up or bought in 1860. We had then been married 24 years and were living together. I had grown children then, and married children also.

Q. Did you not have considerable conversation with both Joseph Moore and Elliott Moore in regard to bringing this action, before it was brought?

A. No, sir, very little conversation I ever had with Elliott; I did with Joseph Moore.

Q. Do you not remember, when it was proposed to bring an action to quiet title, you said that that was all nonsense, and would be unnecessary expense; that it was explained to you that Mr. Von Schmidt, as he was to take a part of the same land, was unwilling to close the bargain with you unless it was done?

A. That is what you told me as my attorney.

Q. Do you not remember that you were informed by Joseph Moore that Mr. Von Schmidt's attorney, Mr. Hayes, required that there should be an action brought to quiet the title of the land as against this son?

A. Yes, sir; for Mr. Von Schmidt; but I never remember of quieting the title for Mr. Brickell at all.

Q. Don't you know that you were told that John Brickell would not make a loan nor advance any additional money until what Mr. Hayes required was done?

103 A. No, sir, I do not remember that. I do not know that he did advance any money, only to build the house upon Bryant street and to buy the Hayward property.

Q. Don't you remember that the loan was not made until the title was quieted?

A. No, sir, I do not.

Q. You do not remember that it was subsequent to quieting the title that this last loan was made?

A. No, sir. I only remember about having to quiet the title to what Mr. Von Schmidt had; that is all that I remember.

Q. Do you remember that the complaint was read over to you and talked over; that this complaint to quiet title was read to you in the office?

A. The portion for Mr. Von Schmidt?

Q. Describing the land described in your former mortgage?

A. No, sir, I don't remember anything of the kind. I only remember it was for Von Schmidt; and that is all I ever thought it was for; to quiet it for Mr. Von Schmidt.

Q. Do you remember whether you made your last mortgage to John Brickell after or before the adjustment with Von Schmidt?

A. No, sir, and I don't remember nothing about the mortgages at all. I know that Mr. Brickell had a mortgage on the land;

104 but what money was got or how much was got, I don't remember; only one mortgage, and that was $36,000.

Q. Do you remember making a deed to Mr. Von Schmidt within a few days before this mortgage was made?

A. There was a deed made to Mr. Von Schmidt for a small portion of the land there; you did it.

Q. Who drew the deed?

A. I don't know.

Q. Do you remember executing the deed?

A. No, sir.

Q. Do you remember signing it?

A. No, sir. I only know of giving to Mr. Von Schmidt a deed for a portion of the land; and that is all that I remember about it. I have no recollection at all about signing it.

Q. Do you remember that Mr. Brickell was very unwilling to make the last loan; that he objected, and absolutely refused to lend any more money until that title was quieted?

A. No, sir, I don't remember that.

Q. Before the mortgage was made to John Brickell you had made mortgages to other persons and parties, you stated, one to Maurice Dore. Did you obtain a loan afterwards from the Savings and Loan Society?

A. My son-in-law did, not me. My son-in-law did it for me.

105 Q. You signed a mortgage and note to the Savings and Loan Society, did you not?

A. I don't remember; I cannot say that I did or that I did not.

Q. Do you not remember that John Brickell took up a loan and mortgage to the Savings and Loan Society?

A. Yes, sir. I remember that he took up a loan; that is what I got the money for, to take up the loans. That is what I mortgaged to him for.

Q. You got a loan placed in the Savings and Loan Society, and that loan to that society was taken up by the money which John

of all, except what he conveyed away, down to the time of his death. After Mr. Baker died, his family, myself and children, resided there on the Golden Gate ranch. He left six children, of whom the plaintiff was one. He (the plaintiff) was born on June 21st, 1861. I am the Maria Baker, who was the administratrix of the estate of John H. Baker, deceased. My husband died on March 30th, 1863. After my husband died I paid the taxes and assessments out of his estate.

97 There was an outside land tax levied upon the Golden Gate ranch. I do not remember how much; it was more than $10,000. I borrowed the money to pay these taxes from Maurice Dore, and mortgaged the Golden Gate ranch to him as security for the money. I talked with defendant Brickell about the ranch in 1874 at the time I mortgaged to him. That conversation was in Mr. Moore's office, in my own house, and upon the street; wherever I met him. He knew I had a minor son, this plaintiff. He said the plaintiff would come in and claim some of the ranch, and asked me if he could not be made to sign a deed. I got the rest to sign, but Adam was too young.

Mr. KELLOGG: Did you ever have a conversation with him about bringing a suit to quiet title against Adam?

A. The Mr. Moores wanted me to quiet the title of the land for Von Schmidt. They advised me to quiet the title; that Von Schmidt would not give a deed to the portion he had taken if I did not.

Q. What were you doing with Von Schmidt?

A. Von Schmidt jumped a portion of the land and got the city deed for it; and we were in controversy about it.

Q. You made a settlement with him?

A. Yes, sir, we settled with him, I believe. Mr. Moore said it was all settled.

98 Q. Then you say you brought this suit against your son to quiet title as to the Von Schmidt portion of the land?

A. Yes, sir.

Q. Did you know that you, as plaintiff, brought suit against your son Adam, who is this plaintiff, to quiet title to the whole of the land in controversy in this suit, the Golden Gate ranch?

A. No, sir, I did not.

Plaintiff then offered, and there *was* admitted in evidence from the abstract of title furnished by Maria Baker to defendant Brickell, before he made any loan on the property, the following papers, to wit:

(1.) Deed (on page 7 of the abstract) of James C. Garner to John H. Baker, dated July 10, 1860, already in evidence, of the tract known as the "Baker tract," sometimes called the Golden Gate tract, conveying all the property in controversy, beside other lands.

(2.) The successive probate proceedings in the matter of the estate of John H. Baker, No. 1552, which have been successively put in evidence by plaintiff, and which are found on pages 21 to 35, inclusive, of said abstract, viz: Maria Baker's petition for letters of administration on said estate, filed April 13, 1863. Order for posting

of notice of said petition, same day. Proof of said posting by affidavit, dated April 17, 1863.

99 Order of court appointing Maria Baker administratrix, dated April 27, 1863. Bond of administratrix, May 1, 1863. Letters of administration to Maria Baker, dated May 2, 1863.

Order of publication of notice to creditors, dated May 1, 1863; affidavit of publication of same, March 18, 1863.

Decree of due publication of same, March 18, 1863.

Inventory of said estate as already described and in evidence, dated and filed June 13, 1863, describing the land as consisting of 220 acres, more or less, of land, and including the land now in controversy.

Petition of widow for family allowance, October 26, 1863, as already in evidence, and the order allowing the same in the sum of $100 per month, payable out of the estate. Petition for order of sale, April 19, 1864. Order to show cause why sale should not be made. Annual account filed August 7, 1865. Order setting time for settlement. Proof of posting notice for allowance of account.

Order allowing said account. Petition for order of sale of real estate, September 7, 1865. Order to show cause why sale should not be made, October 11, 1865. Order of sale, October 14, 1865, being portion of lands described as per inventory of June 13, 1863.

Appraisers appointed July 16, 1867. Inventory and ap-
100 praisement filed July 19, 1867. Bond of administratrix on sale of real estate, August 19, 1867. Return and account of sales of 26 acres to Wm. Ware at $5,200. Proceedings whereby sale was regularly made and confirmed. Final account and report filed December 20, 1867, and on due notice, decree of allowance of final account on December 30, 1867. Petition for distribution, December 13, 1868. Order to show cause on February 13, 1868, why an order of distribution should not be made, and that notice thereof be given by publication. No further proceedings in said probate matter.

The above proceedings appearing on pages 21 to 35 of said abstract. Also, on page 51 of said abstract, deed of Maria Baker (as administratrix of John H. Baker) to Wm. Ware, dated November 27, 1867, duly recorded, consideration $5,200. Recites the foregoing-described order of sale of October 14, 1865; and the various proceedings authorizing the sale thereof as portion of the estate of John H. Baker, deceased.

The deed is regular in form, as to recitals and other matters. Also, on page 201 of abstract, deed by Appelonia M. W. Baker and John H. Baker to Maria Baker Batchelder, dated March 27, 1874, consideration $1, duly recorded; being a grant, bargain and sale of the tract of land known as the "Baker tract, and declared to

be a gift and release of whatever interest grantors may have
101 to grantee," as her sole and separate property and estate.

Also, on page 15 of abstract, deed of John H. Baker and wife to Nathan Porter and E. D. Sawyer, dated September 16, 1862, consideration $500, for ten acres of land, duly recorded.

Brickell gave you on the mortgage? Is that right? Do you remember that?

A. I believe it was.

Q. At the same time, the Maurice Dore mortgage was taken up. There were two mortgages upon the property were there not?

A. I believe so; I believe they were taken up.

Q. The first mortgage John Brickell took up from the Savings and Loan Society and one of Maurice Dore?

A. Yes, sir, I believe so. He made me a further loan; I believe it was on my request, or on my husband's (Mr. Batchelder), I don't know which. He loaned me money to buy the Haywards property and we got that property. I bought the Haywards property with a portion of the money. My husband had all the conversations about loaning the money,—that is my second husband, Mr. Batchelder; he always went for the money. I did not.

106

Q. Was he paid the money in his hands?

A. He asked for the loans, I did not ask for them.

Q. Did he negotiate the loan with Mr. Brickell?

A. Yes, sir, if I understand it right; it was my husband and not me who asked Mr. Brickell for the money.

Q. You did not come to the office of the Messrs. Moore and ask Mr. Brickell to lend that money and make those loans? Do you mean that?

A. He told my husband he would loan the money, and I went there to sign the papers.

Q. Don't you remember that you would not have your husband in the office at all when you talked of business?

A. No, sir.

Q. Don't you remember that you said you did not want your husband to know anything more about that business than he had done?

A. No, sir.

Q. Don't you remember that you asked one of the two Moores whether you could not make that mortgage without your husband signing with you?

107

A. I don't remember it.

Q. On that first mortgage, don't you know that you had him go into the other room while the talking was going on, and would not talk in his presence at all about it?

A. No, sir, I don't remember anything of the kind.

Q. You do not remember asking either of the Moores whether you could not, as it was your own property, make a loan without his signing the note or mortgage?

A. No, sir, I do not remember that.

Q. Don't you remember that in the first place you went to Mr. Brickell's house to solicit the first loan?

A. No, sir.

Q. In the first place; and made this demand or request there?

A. No, sir, I do not remember of being in Mr. Brickell's house.

Q. Did you never go to his house?

A. Never to my knowledge.

Plaintiff on his own behalf, sworn, testified:

I am the plaintiff in this action, and am thirty years old. I was born on the 21st of June, 1861, and am the son of John H. Baker.

I know the property described in the complaint in this action.

108 Q. Did you ever know of a suit being commenced by Maria Baker Batchelder against you, in the 4th district court in and for the city and county of San Francisco, on the 13th day of May, 1876, to quiet title against you as to all of the property in controversy in this present suit?

A. No, sir.

Q. When did you first hear of this suit?

A. Not until this suit was begun or thereabouts.

Q. Were you ever served with summons and complaint in this suit?

A. No, sir.

The summons and complaint in said suit to quiet title brought in said 4th district court on said 13th day of May, 1876, were read and introduced in evidence by counsel for plaintiff. The complaint is as follows:

"The plaintiff in the above-entitled action complains of said defendant, and for cause of action alleges as follows, to wit:

The said defendant is a minor over the age of fourteen (14) years, and of less than sixteen (16) years of age, and that the plaintiff is his mother, with whom said defendant now resides.

That this plaintiff was formerly married to one J. H. Baker, who died in the year A. D. 1863, and that subsequently thereto she was married to one D. F. Batchelder. That prior to the marriage

109 last mentioned and while the plaintiff was a widow and relict of said Baker, to wit: in the year A. D. 1864, she was in the *bona fide* actual possession and has ever since continued to be and now is in said *bona fide* actual possession of all those certain pieces or parcels of land situate in the city and county of San Francisco, State of California, being portions of the outside lands of said city and county of San Francisco, bounded and described as follows, to wit:" (The description includes all the lands in dispute.)

"The plaintiff further alleges that during all the periods of the time last above mentioned, and especially that on and long prior to the eighth (8th) day of March, A. D. 1866, she was in the *bona fide* actual possession of all said pieces and parcels of land, and was claiming and holding, and now claims and holds the same in her own exclusive right, and adversely to all the world, and that she claims the title thereto in fee-simple absolute. That she presented her petition, duly verified, to the board of supervisors of the city and county of San Francisco, praying for a grant of all said pieces and parcels of land, and such proceedings were afterwards duly had, that on the ninth day of December, A. D. 1872, the said board awarded to her a grant of all the lands above described, and afterwards, to wit, on the 9th day of January, A. D. 1873, the mayor of the city and county of San Francisco, and *ex officio* president

110 of said board of supervisors, executed and acknowledged and

delivered to her, this plaintiff, under her then name of Maria Baker, a grant and deed of all the lands and premises hereinabove described, which deed was afterwards, on October 13, A. D. 1873, recorded in the recorder's office of the city and county of San Francisco, in Liber 721 of Deeds, page 127. That said defendant claims an estate or interest in all of said lands and premises, which claim constitutes a cloud upon her said title and depreciates its value. That the claim of said defendant is without right, and that he has not any estate, right, title or interest whatever in said pieces or parcels of land, or in any or any part thereof. Wherefore this plaintiff prays that said defendant be required to set forth the nature of his claim, that the adverse claim of said defendant may be determined by a decree of this court, and that by said decree it be declared and adjudged that said defendant has no estate or interest whatever in or to any of said lands or premises, and that this plaintiff's title thereto is good and valid, and that said defendant and all persons claiming from or under him be forever debarred from asserting any claim in or to said premises adverse to this plaintiff, and for such other and further relief as shall be meet and agreeable to equity."

111 The minute order appointing Judge C. T. Botts guardian *ad litem* for the minor, was introduced and read in evidence by counsel for plaintiff, and is as follows:

"May Term, Tuesday, 26th, 1876.

(Title of Court and Cause.)

In this cause it appearing to the satisfaction of the court that the defendant Adam S. B. Baker is a minor and under the age of 14 years, it is ordered by the court, that Chas. T. Botts, Esq., an attorney of this court, be and is hereby appointed guardian *ad litem* for said infant defendant to defend the said action."

Plaintiff also put in evidence the answer of Judge Botts for the minor, which was as follows:

"And now comes the defendant Adam S. B. Baker, by Chas. Botts, his guardian *ad litem*, duly appointed in this action, and for answer says:

First. That he is an infant of the age of sixteen years or thereabouts, and is ignorant of and a stranger to all and singular the matters stated in the complaint in this action, and therefore submits his rights and interest in the matters in question to the protection of the court.

Second. He denies generally and specifically each and every allegation in the said complaint contained.

(S'g'd) BOTTS & SULLIVAN,
Att'ys for Defendant."

112 Plaintiff next put in evidence the findings and decree in said action to quiet title, which were signed, and filed and are as follows:

"*Findings.*

(Title of Court and Cause.)

This said cause came on regularly for trial before the court sitting without a jury, on the 15th day of August, 1876, E. J. Moore, Esq., appearing as counsel for plaintiff, and C. T. Botts, Esq., who was duly appointed guardian *ad litem* herein to represent said minor, appearing as counsel for defendant, who had heretofore filed his answer to plaintiff's complaint by his said guardian.

The court having heard the evidence of the respective parties, finds as facts:

First. That on and prior to the 8th day of March, 1866, said plaintiff was in the *bona fide* actual possession of all the pieces and parcels of land and the whole thereof in the complaint described, claiming to be the owner thereof, and thenceforward continued to be and now is in such possession.

Second. That said plaintiff presented her petition, duly verified, to the board of supervisors of the city and county of San Francisco, praying for a grant of all the pieces and parcels of land described in the complaint in this action, and such proceedings were afterwards had that on the 9th day of December, A. D. 1872, the said board awarded to her a grant of all the said land so petitioned for.

113 Third. That afterwards, to wit: on the 9th day of January, A. D. 1873, the mayor of the city and county of San Francisco and *ex officio* president of said board of supervisors, executed, acknowledged and delivered to said plaintiff, under her then name of Maria Baker, a grant and deed of all said lands and premises, which deed was afterwards, on October 13, 1873, recorded in the recorder's office of the city and county of San Francisco.

As conclusions of law the court finds:

1. That said defendant has no estate, right, title or interest whatever in the lands or premises described in the complaint, or any portion thereof.

2. That the title of the plaintiff to said pieces and parcels of land is obtained and derived under and by virtue of the final decree of the circuit court of the United States for the district of California, confirming the claim of the city of San Francisco to its public lands, entered May 18, 1865, and of the act of Congress of the United States, entitled, 'An act to quiet the title to certain lands within the corporate limits of the city of San Francisco,' approved March 8, 1866, and of ordinance No. 800 of the board of supervisors of the city and county of San Francisco, and of an act of the legislature of this State confirming said ordinance, entitled 'An act to con-

114 firm a certain order of the board of supervisors of the city and county of San Francisco,' approved March 27, 1868, and that the title of said plaintiff thereto is good and valid.

(S'g'd) R. F. MORRISON, *Judge.*"

"*Decree.*

(Title of Court and Cause.)

Wherefore, by reason of the law and the findings aforesaid, it is ordered, adjudged and decreed:

First. That the said defendant Adam S. B. Baker has no estate, right, title or interest whatever in or to the lands and premises hereinafter and in the complaint in said action described, or in any portion thereof.

Second. That the title of the said plaintiff Maria B. Batchelder is good and valid to all the lands and premises described in the complaint in this action, which said lands and premises are situated in the city and county of San Francisco, State of California, being a portion of the Western addition of said city and county, and described as follows, to wit:

(Being the same premises as described in finding VIII hereof.)

Third. That said defendant Adam S. B. Baker, and all persons claiming from or under him, be forever enjoined and debarred
115 from setting up or asserting any claim, estate or interest in or to the premises, or any thereof, hereinabove described, adversely to the said plaintiff Maria B. Batchelder.

(S'g'd) R. F. MORRISON, *Judge.*"

(Endorsed:) Filed September 1, 1876.

Said decree was recorded on the 23d day of January, 1886.

The foregoing papers were put in evidence, as stated by counsel, not as a judgment and decree entered, but only as such findings and decree signed by the judge, and dated September 1, 1876.

On cross-examination witness testified:

On May 26th, 1876, I was living at Haywards. I have no recollection of going to the office of J. H. and E. J. Moore during that year. I remember going into their office once or twice before the former trial of this case, I think, and seeing them. I do not remember why I went there. I went with my mother. I cannot say that I ever saw Mr. Martin before I came into court. I do not remember his giving me any paper in the Moores' office; nor do I recollect the object of my going to the office.

Q. Do you remember where you came from to go there?

A. From the house, I believe, in Haywards.

Q. How did you happen to go there?

A. I don't remember.

116 Q. Do you remember whom you met there?

A. No, sir.

Q. Do you remember meeting your mother there?

A. I went there with my mother.

Q. Do you remember that she brought you over?

A. I came to the city with her. I have no recollection as to what I was doing in there or how long I remained. I think I was

then about 14 or 15 years old. I did not do anything in the office that I know of. I was at that time going to school at Haywards. I think I went from that office down to my brother's on Bryant street. I do not remember anything that my mother said whilst we were in the office of the Messrs. Moore. I don't think I was at their office more than once. I was in town all day that day. I was at Haywards for two years. I don't know how often I came to the city during that period. I remember testifying on the former trial in this case.

Q. Do you remember stopping at any place between your leaving Haywards and your coming to the office of the Moores?

A. No, sir; I don't remember.

Q. What is your impression about it; was that the first place you stopped at on the day you came up?

A. I don't think it was; I don't know.

117 Q. Can you not remember a very large lounge in the office on which you and your mother sat for an hour or two?

A. No, sir.

Q. You do not remember that you and your mother were waiting for any one to come in?

A. No, sir.

Q. What is your impression about the length of time you stopped in the office?

A. I don't think I stopped there but a very little while.

Q. How long would you call a little while?

A. Fifteen or twenty minutes; or something like that.

Q. Was your mother with you all of that time?

A. Yes, sir.

Q. Do you remember seeing me there?

A. I believe you were there.

Q. Had you ever seen me, Joseph Moore, before that time?

A. No, sir.

Q. Did you ever see me afterwards, before you came into court here?

A. I saw you on the street several times; yes, sir.

Plaintiff next offered and there was admitted in evidence the verified petition of Maria Baker to the board of supervisors
118 of the city and county of San Francisco for a grant to her of the lands described in the complaint, the same being a part of the Baker tract, said petition being dated December 2d, 1872, and as follows:

"The petition of Maria Baker (widow), resident of the city and county of San Francisco, State of California, respectfully shows:

That your petitioner, by herself, has been, from and including the 8th day of March, A. D. 1866, and still is in the possession of the following lands, situate, lying and being in the city and county of San Francisco, and that said lands are exclusive of the lands reserved for public uses, and are described as follows, to wit:

Here follows descriptions, being the same premises described in

city deed to Maria Baker, which is elsewhere in this statement particularly described.

That said land is embraced in the lands described in the decree of Justice Field of the U. S. circuit court, confirming the claim of the city and county of San Francisco, entered November 2, 1864, in the circuit court of the United States for the northern district of the State of California, and has not been sold, leased, dedicated, reserved or conveyed by authority of the said city and county of San Francisco, or the United States, or to any one for any purpose.

119 And your petitioner hereby asks that a grant of said lands be made to Maria Baker, under the provisions of an act entitled 'An act to expedite the settlement of land titles in the city and county of San Francisco,' etc. Approved March 24, 1870.

Dated at the city and county of San Francisco, Sept. 14, A. D. 1872.

(S'g'd) MARIA BAKER."

Affidavit.

STATE OF CALIFORNIA, }
City and County of San Francisco. }

Maria Baker (widow), of said city and county, being duly sworn, deposes and says:

I am well acquainted with the tracts of land described in the annexed petition, they being a part of a larger tract of land purchased by my husband John H. Baker from James C. Garner, under a deed dated July 11, 1860. Said deed was recorded in Liber 109 of Deeds, page 468, on the same day. That the said John H. Baker, and Maria Baker, his wife, and their family of seven children, took immediate possession of said land described in this petition, built a comfortable house and barn, and dug wells upon the same, and carried on a milk business, having thirty or forty cows and half dozen of horses, wagons, plows, etc.; that they plowed and cultivated part of the land by raising potatoes, oats, etc., enough for the purpose of carrying on said milk business; and the balance

120 of the land not so cultivated was used as pasturage grounds for said cattle and horses; and that the fences were always kept in good condition to turn cattle, by this deponent and her family; and Maria Baker (widow), your petitioner and her family of children have been in the actual *bona fide* possession of the land described in this petition, since July 11, 1860, continuous up to the present day, and so continues to occupy the said lands. And in short, my possession of this property through myself is full, undisputed and notorious from July 11, 1860, up *the* the present date. Your petitioner's claim to this land was delineated upon the official map of the outside lands in proper manner and form. The outside lands assessment has been paid in full; also the city and county and State taxes for the five years previous to 1866. And I am in-

formed and believe the city and county and State taxes for the current year are not yet due.

(S'g'd) MARIA BAKER.

(Duly verified.)

MARIA BAKER (WIDOW).

STATE OF CALIFORNIA, }
City and County of San Francisco. }

Wm. Ware of the city and county of San Francisco, being duly sworn, deposes and says: That he is 43 years of age. I am a dealer in machinery and importer of machinists' tools. I am very
121 well acquainted with the tract of land described in the annexed petition. I have read the testimony of Maria Baker, and the same is true in every particular. To my own positive knowledge her possession was long prior to March 8, 1866, and so continues.

(S'g'd) WM. WARE.

(Duly verified.)

It was admitted that under said petition such proceedings were had in due form of law; that a grant was made in accordance with the prayer of said petitioner; and afterwards, on the 9th day of January, 1873, in pursuance of said grant, a deed was made and executed by the said city and county of San Francisco, by Wm. Alvord, mayor to said Maria Baker of said land, conveying to said Maria Baker all the right, title and interest of said city and county therein and thereto.

It was admitted that a deed of the property involved here as described in the complaint herein was issued by the city and county of San Francisco, under said application, to said Maria Baker, and that she was then still the administratrix of the estate of J. H. Baker, deceased.

Said deed was dated January 9, 1873, and was the same day recorded in Liber 721 of Deeds, page 127, of the county recorder's office of said city and county. It was understood that said deed was introduced by plaintiff in full, as the same was executed, but same need not be here inserted.

122 JOSEPH H. MOORE, sworn, testified:

I am an attorney-at-law. At the time of the first loan by John Brickell to Mrs. Baker Batchelder, Brickell placed in my hands this abstract for examination, which is the same abstract from which pages have been introduced here for plaintiff. The same things appeared upon the pages of that abstract at the time of that examination as now appear, and as have been introduced in evidence by the plaintiff in this action, excepting such things as are shown upon their face to be subsequent to that time, that is, subsequent to 1876. I examined it for Brickell and knew of the facts that appear on the pages so in evidence here, as far as they were shown in the abstract.

Plaintiff then offered and there was admitted in evidence an act of Congress of the United States, approved March 8th, 1866, and entitled "An act to quiet the title to certain lands within the corporate limits of the city of San Francisco," as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all the right and title of the United States to the land situated within the corporate limits of the city of San Francisco, in the State of California, confirmed to the city of San Francisco by the decree of the
123 circuit court of the United States for the northern district of California, entered on the 18th day of May, one thousand eight hundred and sixty-five, be, and the same are hereby relinquished and granted to the said city of San Francisco and its successors, and the claim of the said city to said land is hereby confirmed, subject, however, to the reservations and exceptions designated in said decree, and upon the following trusts, namely, that all the said land, not heretofore granted to said city, shall be disposed of and conveyed by said city to parties in the *bona fide* actual possession thereof, by themselves or tenants, on the passage of this act, in such quantities and upon such terms and conditions as the legislature of the State of California may prescribe, except such parcels thereof as may be reserved and set apart by ordinance of said city for public uses:

"Provided, however, that the relinquishment and grant by this act shall not interfere with or prejudice any valid adverse right or claim, if such exist, to said land or any part thereof, whether derived from Spain, Mexico, or the United States, or preclude a judicial examination and adjustment thereof."

Here plaintiff rested.

Defendant John Brickell, in support of the issues on his part, introduced the following testimony:

124 JOHN BRICKELL, sworn, testified on his own behalf as follows:

I am the defendant in this action.

(By Mr. MOORE:)

Q. Will you state your recollection about the manner in which your loans came to be made to Mrs. Batchelder; the first loan and the subsequent loan?

Mr. KELLOGG: I object to that question as incompetent, irrelevant and immaterial. There is no issue upon that question at all, between the plaintiff and the defendant.

Objection overruled; exception taken. (Exception No. 1.)

A. In the spring of 1874, a broker, Mr. Edwards, called upon me to make a loan upon this Golden Gate ranch or Baker tract; and subsequently introduced Mrs. Baker to me as the owner. After talking with her some time, and inquiring as to her title, which she emphatically told me was hers and hers alone; that she had

the city deed, and claimed the whole of it and owned the whole of it, I concluded to loan her $36,000. Of that money I paid the Savings and Loan Society and Maurice Dore, principal and interest, thirty-odd thousand dollars, probably $32,000, and the balance I turned over to her, in various ways. There were two mortgages upon it when I loaned the money; one to the Savings and Loan
125 Society and one to Maurice Dore, which I took up and paid.

I never had any negotiations with Mr. Batchelder; she always repudiated her husband; in fact did not allow him in the room. I never knew him in the transaction, and he never received any of the money.

Time and again Mrs. Batchelder reiterated that she alone was the owner of that property, that she had the city deed, and that her children had no interest in it and did not claim any.

Q. Do you remember anything about its being spoken of that the deeds of the other children were desired before any loan was made at all?

A. Yes, sir; of two of them.

Q. What do you remember about that?

A. That you insisted upon getting deeds from two of them. This one was a minor.

Q. Before the first loan was made?

A. Yes, sir.

Q. What did she say upon that subject, when it was proposed to get them?

A. She repeated that it was entirely nonsense; that her children made no claim to the property; that they did not have any interest; that she had it entire; and if anybody intimated that her children were interested in that property, she was very much exercised about it. I insisted upon following the advice of my attorney, Mr. Moore, and she hooted the idea time and again.

126 With reference to the last loan made by me, I will state: When I first got the mortgage upon this land there was a portion of the land she had possession of that Mr. Von Schmidt had a city deed to. My mortgage covered it; they were in litigation; but finally they came to some compromise. I was to release a portion of the land that she had the city deed for; and Von Schmidt was to reconvey a portion of this land that he had a city deed for. Messrs. Stanley, Stoney & Hayes were the attorneys for Von Schmidt.

The abstract was placed in their hands and they objected to the title on account of this minor heir, and insisted on the title being quieted as against him. That put me on my guard. About this time she was importuning me for $2,000 more. I refused to let her have it until she quieted Adam's title as against the whole ranch, and a few days after the deeds went on record; the exchange of deeds between Mrs. Batchelder and Mr. Von Schmidt and my release; and I loaned her $2,000 additional. I can give you the exact number of days.

I refused to give her any more money unless she quieted the title of her son Adam against this entire ranch. In my interviews with

her I positively refused to loan her more money unless she quieted the title of her son against this entire ranch.

My release to Mrs. Batchelder was recorded on February
127 16th, 1877, and my mortgage of $2,000 was recorded February 20th, 1877, three days after the record of the papers or of this compromise. After that decree was signed, and the papers went on record, I let her have the money. They were a long time, and there were a good many details, but that was the only consideration for which she got the $2,000. I never would have given it to her except she had quieted the title for the entire ranch.

I had a number of conversations with her upon that subject. I think most of them were had in Mr. Moore's office; there is where she usually came. She asked me frequently for this additional loan before I let her have it. I was reluctant to make it; it was not a business proposition. I did it through sympathy—not altogether, of course, but I was guided somewhat by sympathy. I knew that I was giving her more money than she ought to get on the land. When I got judgment against her I could not have got my $63,000 out of it. I offered them the sheriff's deed of their property to pay me my money; but they laughed at me. After the foreclosure sale, I offered them the sheriff's deed and said "I will assign this to you; just pay me my principal and interest;" but they laughed at me.

I was a good man as long as I was shelling out money to
128 her. When I was letting her have the money, between the first and the last loan, she took my hat off my head in the office and put her hand on my head and said "May God Almighty bless you and all your family for your kindness to me."

At the time of making the first loan to her she brought her former attorney, Mr. Holladay, into the office to satisfy us that her son Adam could not have any title and that she held the exclusive title. That was before I made the first loan. The Moores insisted upon having deeds from these older children; and Mr. Holladay said the title was perfect without them, and that he knew the title was vested absolutely in her alone. She said he had been her attorney, and she brought him in for the purpose of convincing us that the title was vested in her absolutely.

She never in any particular, in any instance, said to me that she was only claiming a half interest in this land; if she had, she would never have got a dollar out of me. She never spoke about having it in trust for anybody. On the contrary, she was very sensitive if anybody implied that any of her children had any interest in that property.

Mr. Moore, my attorney, required that David F. Batchelder the husband of Maria Baker Batchelder, should join in the notes and mortgages that were made to me. There were no negotiations
129 at all made with the husband, David F. Batchelder. The entire negotiations were made with Mrs. Maria Baker Batchelder individually, for the loans, the notes, the amount, interest and time. She received all the moneys directly; I never paid any money to her husband. He was a cipher in the whole transaction;

and she did not want him to be in the room and objected to his signing, stating that he had no interest in the property.

Cross-examination of JOHN BRICKELL:

I don't know whether the abstract of the title to the Baker ranch was delivered to Mr. Moore or to me before I made a loan upon it. If it was delivered to me I handed it to Mr. Moore. (Abstract shown to witness.) The portion of that abstract which comes down to the date of my making the loan, including all the portions thereof which Mr. Kellogg has read in evidence up to that date, is the abstract of the Batchelder property, which my attorney examined for me for the purpose of making the loan. At the time I made these loans I probably knew that Mrs. Baker Batchelder had a minor son, but I am not positive as to that. I knew that my attorneys required deeds from some of the Baker children before they would complete this loan.

I knew of this suit to quiet title. I refused to loan Mrs. Baker any more money unless she would bring this suit to quiet title and have it carried to judgment. I insisted upon either that or
130 that she would not get the money; it was optional with her whether she quieted the title or not. I did not know that there were proceedings in the estate of John H. Baker, deceased. I did not know what was in the abstract then; I left that to my attorney; that was his business; I know pretty well what is in it now.

I don't know what that property is worth now; it is purely speculative. It is worth as much as $75,000, because I would give that for it; but I do not know whether it is worth $100,000. I have never offered it for sale; I do not admit that it is worth any more than $75,000.

I think I have been in possession of the property since 1879 or 1880; sometimes I have had it rented; portions of it are rented now; but it does not pay its expenses by a long way.

Redirect examination of JOHN BRICKELL:

A part of this property that was covered by my mortgage and also by the Von Schmidt mortgage was released by me before the foreclosure proceedings.

GEORGE MARTIN, sworn as a witness for the defendant Brickell, testified:

On May 13th, 1876, I served the summons and complaint on Adam S. B. Baker, then a minor, in the suit of Maria Baker Batchelder against Adam S. B. Baker, No. 20431, in the former
131 district court of the 4th judicial district. The summons I now hold is the original summons which I served, and the sworn return thereon is written by me and is correct. At that time I had an office in the same building with the Moores. Joseph Moore left a note on my desk to call at his office to make service upon a person who was waiting there for that purpose. I saw Mrs.

Batchelder there. She then introduced her son Adam S. B. Baker, as her son, the defendant, and I then served him with the papers in the case. I gave him a copy of the summons with a copy of the complaint attached. My business at that time was doing copying for lawyers and serving papers—serving papers of the same character as these. I served papers for several firms of lawyers at that time.

Cross-examination:

On cross-examination, the witness said:

The circumstances of that service made more than the usual impression because it was unusual to have a defendant in an action put himself in the way of being served, for we generally have to hunt for them and find them at their houses. In this case Mr. Moore left a line on my desk and I went in there; I believe I was late that morning. I had my office in Montgomery block, opposite Mr. Moore's. I judged that the defendant was at that time about
16 or 17 years old; he looked like a young man; he was in-
132 troduced to me by his mother. That was the first time I ever saw him. I think that his mother said that he was a minor and stated his age. I know that I served him with the papers, and that there was a statement made to me as to his age. The affidavit of service is in my handwriting. I remember swearing to that affidavit before Mr. Blood, notary public, in his office. It made an impression upon me that a mother should introduce her son, and their being brought together in that way in a lawyer's office, and that I should have so little trouble serving him. The boy and I had some conversation in the room about the case, and he took the paper from my hand; when I handed him the summons I told him that it was a summons, and I read to him a copy of the complaint; read to him the title of the court and cause, and said, "I have got to serve you with these papers in the case of Maria Batchelder against Adam S. B. Baker," and I served him in the usual course then. I should think that he knew what the summons meant; he seemed to know all about it.

The defendant Brickell here offered in evidence the entire judgment-roll in the case entitled Maria Baker Batchelder *vs.* Adam S. B. Baker, in the fourth district court, No. 20431, assigned afterwards to department No. 7 of the superior court, and the remittitur annexed to the judgment-roll, stating that this is the action to
133 quiet title and the same suit of which Mr. Kellogg, on behalf of plaintiff had introduced disjoined papers.

The plaintiff objected to the said papers as immaterial, incompetent and irrelevant; that the judgment is not pleaded in any of the pleadings in this case, as an estoppel or otherwise.

Mr. DROWN: I think in the supplemental answer it is pleaded as an estoppel. The supplemental answer may be found in the printed transcript, page 23 (reads supplemental answer).

The court thereupon overruled the objection, and the plaintiff excepted to said ruling. (Exception No. 2.)

The judgment-roll consisted of the complaint, heretofore set out by the plaintiff in this statement, and here again deemed to be inserted by reference, and of the summons and affidavit of service thereof, next hereinafter set forth, and of the answer heretofore in this statement recited and set forth and hereby referred to and deemed to be here inserted, and of the findings and decree, heretofore in this statement set forth and hereby referred to, and here deemed to be inserted, and the certificate of the clerk to said judgment-roll, next hereinafter copied.

Summons.

In the District Court of the Fourth Judicial District of the State of California in and for the City and County of San Francisco.

134 MARIA B. BATCHELDER, Plaintiff,
vs.
ADAM S. B. BAKER, a Minor, Defendant.

Action brought in the district court of the fourth judicial district of the State of California in and for the city and county of San Francisco and the complaint filed in said city and county of San Francisco, in the office of the clerk of said district court.

The People of the State of California send greeting to Adam S. B. Baker, defendant:

You are hereby required to appear in an action brought against you by the above-named plaintiff, in the district court of the fourth judicial district of the State of California, in and for the city and county of San Francisco, and to answer the complaint filed therein within ten days (exclusive of the day of service) after the service on you of this summons—if served within this county; or, if served out of the county, but in this district, within twenty days; otherwise within forty days—or judgment by default will be taken against you, according to the prayer of said complaint.

The said action is brought to obtain a decree forever quieting plaintiff in her title to certain parcels of land, being portions of the outside lands, situated in the city and county of San Francisco,
135 California, being a portion of blocks 95, 96 and 97, the whole of blocks 98, 99, 100, 101 and 102, a portion of blocks 103, 150, 151, 152, 153, 154, and 155, and also a tract of 63.71 acres, the whole of said lands lying within the same tract, and being portions of what is known as the "Baker tract," and particularly described in the complaint on file, to which reference is specially made; that defendant be required to set forth his claim to said premises; that said claim of defendant be adjudged invalid; that he be debarred from asserting any claims thereto; that plaintiff's title thereto be decreed good and valid, and for such other and further relief as may be just.

And you are hereby notified that if you fail to appear and answer the said complaint as above required, the said plaintiff will apply to the court for the relief demanded in said complaint.

Given under my hand and seal of the district court of the fourth judicial district of the State of California, in and for the city and county of San Francisco, this 13th day of May, in the year of our Lord one thousand eight hundred and seventy-six.

THOMAS H. REYNOLDS, *Clerk*,
[SEAL.] By WM. LEDLIE, *Deputy Clerk*.

(Endorsed:) Filed July 25th, 1876. Thos. H. Reynolds, clerk; Wm. Ledlie, dep. cl'k.

136 *Affidavit of Service.*

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss:

George Martin, being duly sworn on his oath says: I was on and prior to the 13th day of May, 1876, over the age of eighteen years, and am not and have never been a party to the action herein entitled. The defendant in said action, Adam S. B. Baker, is and was on the 13th day of May, 1876, a minor over the age of fourteen years, and he then resided and now resides within this State. On the 13th day of May, 1876, I served the summons in said action annexed hereto on the defendant therein, Adam S. B. Baker, by delivering to said defendant personally in the city and county of San Francisco, in this State, a copy of said summons, and I also at the same time and place served on said defendant a copy of the complaint in said action by delivering said copy personally to said defendant personally.

GEORGE MARTIN.

Subscribed and sworn to before me this 22d day of July, 1876.
[SEAL.] J. H. BLOOD,
Notary Public.

Certificate to Judgment-roll.

(Title of Court and Cause.)

I, James J. Flynn, county clerk of the city and county of
137 San Francisco, State of California, and *ex officio* clerk of the superior court thereof, do hereby certify the foregoing to be a true copy of the judgment entered in the above-entitled cause and recorded in the Judgment Book 3 of said court, at page 11, department No. 7, and I further certify that the foregoing papers hereto annexed constitute the judgment-roll in said cause.

Witness my hand and seal of said superior court this 23d day of January, A. D. 1886.

JAS. J. FLYNN, *Clerk*,
[SEAL.] By E. P. CASSERLY,
Deputy Clerk.

(Judgment-roll endorsed:) Filed January 23d, 1886. Jas. J. Flynn, clerk, by E. P. Casserly, deputy clerk.

Remittitur.

(Title of Court and Cause.)

Supreme Court. No. 11495.

And now, at this day, this cause being called, and having been heretofore submitted and taken under advisement, and all and singular the law and premises having been fully considered, the opinion of the court herein is delivered by Works, J.

I concur.

BEATTY, *C. J.*

I concur in the judgment.

PATERSON, *J.*

138 Whereupon, it is adjudged and decreed by the court, that the judgment of the superior court in and for the city and county of San Francisco in the above-entitled cause be and the same is hereby affirmed.

I, J. D. Spencer, clerk of the supreme court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above-entitled cause on the 25 day of May, 1889, and now remaining of record in my office.

Witness, my hand and the seal of the court, affixed at my office, this 25 day of June, A. D. 1889.

J. D. SPENCER, *Clerk*,
By FRANK MYERS, *Deputy*.

[SEAL.]

Filed Jan. 26, 1889.

WM. A. DAVIES, *Clerk*,
By J. G. BOOBAR,
Deputy Clerk.

J. H. MOORE, called and sworn as a witness for defendant Brickell, testified:

I am a member of the firm of E. J. & J. H. Moore, which has been a firm of practicing attorneys in this city for over 25 years, having an office in Montgomery block. I was the attorney who examined this abstract for Mr. Brickell at the time of his original loan to Mrs. Batchelder. Before the first loan was made, I required the execution of certain deeds by the children of Mrs. Baker
139 as being a proper precaution against any of the children making a future claim. After examining the title I found that there were some two or three of the children, at least three, who had not signed. Two at least had signed who had been of age at the time they had signed; that is, two had signed long prior to any negotiations for this loan. I required conveyances from the rest of the children, for the reason that there was a possibility, and

there might be a strong possibility, that in the future they would come in and claim to have an interest in the property; and I wanted to shut out every possible claim that could come up. Mrs. Baker strenuously objected to this and said that they did not make any claim, and that they could not and would not. That they would not if they could. She said that her title was absolutely perfect; that her attorney, Mr. Holladay, had so told her, and would so tell us; that he had examined the title carefully and knew exactly her title, and would tell us, after his own examination, that he had come to that full conclusion, and would satisfy us that her title was perfect without any additional conveyance to her of the title of others. Mr. Holladay came to our office at the request of Mrs. Baker; they came together, he and she; Mr. Holladay in her presence said substantially this: "Mrs. Baker Batchelder has asked me to come with her and state my opinion and
140 view as to her title to the land, that she tells me she is about getting a loan upon, and I have said to her, and I say to you, that I consider her title perfect; that her children could never come in for any claim, or any valid claim upon any portion of the land which she has had a city deed to;" that is the substance of the conversation had in the presence of Mrs. Batchelder.

There was only one suit to quiet title as against Adam S. B. Baker. I knew of the controversy between Mr. Von Schmidt and Mrs. Baker, and was the attorney for the defense for her in that matter. That litigation sprung up between the first and second loan made by Mr. Brickell. Our firm represented Mrs. Baker in the defense of the Von Schmidt claim to a portion of this land. The controversy was adjusted by the exchange of lands which, however, was not effectuated until there had been an action to quiet the title. Stanley & Hayes represented Mr. Von Schmidt as his attorney in that controversy and adjustment. The suggestion as to that suit to quiet title against Adam S. B. Baker came from Mr. William Hayes of that firm. He said that he was not willing that Mr. Von Schmidt should make an exchange, or give any land, until the title of the minor Adam S. B. Baker was quieted in favor of his mother, and in consequence of that demand made by Mr. Hayes, that suit to quiet title was brought by our firm as attorneys still for Mrs. Batchelder.

141 I was in my office at the time that the papers in this suit were served. Prior to the suit, I had several conversations with Mrs. Batchelder concerning it. The complaint in this action to quiet title was at one time in her possession; she did not read it, but I read it to her. I was present at the time of the service of the summons. Adam S. B. Baker and his mother, Mrs. Batchelder, came to our office that morning early, about nine or ten o'clock, and waited there an hour at least, probably more, in order to have Mr. Martin, who had an office upon the same floor in the Montgomery block, make a service of the complaint and summons upon this son, Adam. They were there by prearrangement and appointment of several days before. The very day of the filing of the complaint and issuing of the summons they came in by preappointment.

The boy was brought there by his mother pursuant to the same appointment, in order to have him served with process. They waited there that time. Mr. Martin was away an hour or more during the morning, and finally he came in and I or Mr. Elliott Moore, I forget which as we were both there, handed him the summons and complaint, and told him what we wanted him to do. Mrs. Batchelder and her son Adam were there, and we explained to him that we wished to have him make a service of that summons and complaint and to make his return of the service. This
142 instruction or explanation was made to him in the presence of Mrs. Baker and of her son Adam; they were there together in the same room. Mrs. Batchelder at once introduced her son to him as "My son, Adam;" and he then immediately said, directing his conversation apparently to the lad, "Adam, here is a copy of the summons and complaint in this action." The mother then made some sportive remark about the matter, that here was a person served that did not make any claim, a queer thing to do,—or something to that effect,—to serve a person that did not make any claim, and some conversation was carried on between the three for some minutes, and then he went out. It was the very summons and complaint in this action which had been drawn or prepared for the purpose. He had the original summons in his hand and also the copy. I gave the original summons into Mr. Martin's hands, as well as a copy of the summons and complaint, and he did something in the way of comparing the two, I remember. He was very precise in the way of making service.

Cross-examination of JOSEPH H. MOORE:

Adam and his mother came to my office, my appointment and the complaint and summons were al- ready to serve when they arrived, but Mr. Martin was not there to serve them. When
143 they came the complaint in the action had already been filed and the summons issued. Mrs. Batchelder had been in the office several times within a week or ten days prior to this time; she was very anxious to have the business completed, because she wanted some money, and she came in several times to see if it was not done.

Redirect examination of JOSEPH H. MOORE:

Prior to the institution of this suit to quiet title, Mrs. Batchelder had already applied for an additional loan, the last loan that was made, and, in the meantime, this question had come up as to the exchange of loan with Mr. Von Schmidt; and Mr. Von Schmidt's attorney said, as I have stated, that he would not allow the exchange unless the title was quieted to that land. And in addition I told her—Mr. Brickell being present—that the attorney of Mr. Von Schmidt had taken that view of the matter and that the safe thing was to have the title quieted; and I said that, as regarding Mr. Brickell and another loan, I would not be willing and that he would

not be willing that another loan should be made or more money advanced upon the land he had already loaned money upon, until the title to that land was quieted in a suit against her son Adam, in her favor. I mean by the "title to that land," the entire tract. Mr. Von Schmidt's part was a very small portion of the entire tract, not one-hundredth part of it probably.

144 Defendant Brickell next put in evidence the following papers:

(1.) The tax receipts for lands (describing the tract) for the fiscal year 1862–'3, in which the land is called 180 acres, and assessed or valued at $1,800, and the improvements at $300.

(2.) The delineation of the outside land map of the Baker tract designated as "Mrs. J. H. Baker's tract."

(3.) Annual account of administratrix, verified by Maria Baker August 5th, 1865, and filed on August 7, 1865, already offered by plaintiff, stating appraised value of personal property, June 13, 1863, to have been personal property $230, real estate, appraised value, appraised, June 13, 1863, at $1,100.

Said defendant Brickell also put in evidence partial release of that certain mortgage of June 1st, 1874, which has been already proven, and which is referred to in complaint; particulars of which release are found on page 210½ of abstract of portion of the lands described in the aforesaid city deed, but not a portion of those lands of defendant Batchelder, which were afterwards foreclosed and sold by said Brickell, as referred to in complaint.

Said Brickell also put in evidence verified complaint by Maria Baker *vs.* A. W. Von Schmidt *et als.*, in the fifteenth district
145 court, brought June 4, 1872, No. 7687, for portion of said Baker tract, in which she claims to be the exclusive owner thereof, found on page 163 of Abstract. Also her verified answer in the suit of A. W. Von Schmidt *et al. vs.* David F. Batchelder *et al.*, in said district court, August 8, 1874, in which she makes the same allegation of sole ownership found on page 211 of Abstract, of portions of the Baker tract. Also her verified answer in the foreclosure suit of John Brickell *vs.* Maria B. Batchelder *et al.*, in which said defendant Batchelder makes a like allegation; said action being in the 23d district court, brought June 25, 1878, and found on page 261 of said Abstract, portion of the lands in dispute. Also said defendant Maria B. Batchelder's verified complaint in ejectment *vs.* John Brickell, *et al.*, in the superior court, city and county of San Francisco, case No. 9763, brought June 23, 1883, in which she makes the same allegation found at page 281 of Abstract. Also a verified complaint Maria Baker *vs.* Alex'r Austin, tax-collector, etc., brought in the 12th district court, June 6, 1870, No. 15709, by Porter and Holladay, her attorneys, alleging her sole ownership, and alleging delineation of her said land on the outside-land map as "Mrs. J. H. Baker's tract," found at page 30 of said Abstract.

Defendant also puts in evidence the following conveyances
146 made by Maria Baker (and recorded) as exclusive owner of different portions of the Baker tract, as shown by said abstract, viz:

(1.) Maria Baker to E. D. Sawyer, August 21, 1874, part of O. L. block 95, Liber 627 of Deeds, page 143, page 161 of Abstract.

(2.) Mortgaged to Maurice Dore for $11,648, August 17, 1872, in Liber 372 of Mortgages, page 261, at page 179 of Abstract.

(3.) Same to Savings and Loan Society, December 30, 1872, for $12,000, recorded in Liber 691 of Deeds, page 344, at page 185 of Abstract.

(4.) Same to the city and county of San Francisco, deed Jan. 15, 1873, recorded in Liber 697 of Deeds, page 135, page 191 of Abstract, being the streets lying between the blocks described in the said city deed to Maria Baker.

(5.) Same to Nathan Porter and S. W. Holladay, deed; consideration $2,000; Sept. 1, 1873; recorded in Liber 726, page 209, at page 195 of Abstract, portion of land described in said city deed to Maria Baker.

(6.) Same to E. D. Sawyer, deed April 20, 1876, recorded in Liber 867 of Deeds, page 165, at page 237 of Abstract. Portion of outside land blocks 95 and 96, as described in said city deed to Maria Baker. Same and husband to A. W. Von Schmidt, February 15, 1877, recorded in Liber 865 of Deeds, page 228, at page 245 of Ab-
147 stract; a tract of land. Also deed, Lundberg to J. P. Buckley, dated May 13, 1864, at page 39 of Abstract. A portion of the land conveyed to said Von Schmidt by said deed of February 15, 1877, was within the land granted to said Maria Baker by the city deed, and such portion was released by Brickell from his mortgage at the time of the compromise with Von Schmidt.

(7.) Also declaration of homestead by John H. Baker and Maria Baker, wife of John H. Baker, dated September 16, 1862, upon and including the lands in controversy, recorded in Liber 7 of Claims of Homesteads, page 313, found at page 9 of Abstract.

Also, abandonment of the above homestead by John H. Baker and Maria, his wife, dated September 12, 1862, and recorded; found on page 13 of Abstract.

Also, declaration of homestead by John H. Baker, and Maria, his wife, dated September 16, 1862; recorded September 23, 1862, in Liber 7 of Declaration of Homesteads, at page 371, which is as follows:

Declaration of Homestead by John H. Baker and Wife.

Know all men by these presents: That we, John H. Baker, of the *the* city and county of San Francisco, State of California, and Maria Baker, his wife, do hereby declare and make known that we
148 are lawfully married to each other, and intend to claim the property hereinunder described as our homesteads; that we are, at the time of making this present declaration, residing with our family in the premises hereinafter described, and that it is our intention to use and claim the same as a homestead, under and by virtue of the act of the legislature of the State of California entitled "An act to amend an act to exempt the homestead and other property from forced sale in certain cases," passed April 21, 1851, passed

April 28, 1860, and the act thereby amended and an act supplementary and amendatory, passed May 12, 1862.

The property so declared as claimed, and intended to be used and claimed by us, as and for a homestead for ourselves and family, is situate, lying and being in the city and county of San Francisco, and is bounded and described as follows; that is to say:

"Commencing at a point where Sweeney and Baugh's east line intersects the Pacific ocean; thence south, following said line, twenty-six $\frac{23}{100}$ chains; thence east 73.71 chains; thence north 36 deg. 30 min. west twenty chains to Lobos creek; thence westerly along the course of said creek to the Pacific ocean; and thence along the beach of the Pacific ocean to the place of beginning."

Less the quantity sold to the "San Francisco water works,"
149 to wit: one hundred and fifty feet in width along and parallel with said Lobos creek; also less the quantity sold to Nathan Porter and E. D. Sawyer, to wit: ten (10) acres; and also less the quantity conveyed by deed of gift to Mary Jane Lundberg, to wit: twenty-five (25) acres.

In witness whereof, we have hereunto set our hands, at the city and county of San Francisco, the sixteenth day of September, in the year of our Lord one thousand eight hundred and sixty-two.

JOHN H. BAKER. [SEAL.]
MARIA BAKER. [SEAL.]

In presence of—
ALFRED BARSTOW.

(Duly acknowledged.)

To which declaration of homestead plaintiff objected, on the grounds that the same was incompetent, irrelevant and immaterial under the pleadings, and that there was no sufficient description of property therein, and that Mrs. Baker was estopped by the proceedings in the probate court to claim a homestead in the premises.

Objections overruled; plaintiff excepts.

(Exception No. 3.)

P. H. BLAKE, witness for defendant Brickell, sworn, testified:

From 1860 to 1880 I resided in San Francisco; from 1860 to September, 1863, I resided south of Market street, and from
150 September, 1863, I resided out at this end of the toll road for about ten years after that. After 1863 I had charge of the toll-house on the Point Lobos toll road. Prior to that I was with Dr. Gates.

I knew the tract called the Baker tract, sometimes called the Golden Gate ranch, in 1860, and also in 1862 and 1863. I knew the value of land situated where that was, and in that immediate neighborhood on September 16th, 1862. In the neighborhood of that tract were the Phelan tract and the old Dupont claim, afterwards bought by Wilson & McCabe, and the Smoke ranch. I know what those lands brought in the market at that time, or what they were offered for in the market.

Q. What was it?

Mr. KELLOGG: I object to the question as irrelevant, incompetent and immaterial; also that such knowledge and the answer that witness would give is not such as would enable the court to form an opinion of the market value.

The court overruled the objection, to which ruling plaintiff duly excepted. (Exception No. 4.)

A. From $5 to $15 an acre; anywhere from First avenue out to the Cliff house.

Mr. MOORE:

Q. That would be the value, also, of the Baker tract?

A. It would include all of that part of the peninsula lying west of First avenue. I knew just where the Baker tract was
151 located at that time; the lines were very well defined; there were no fences to amount to anything.

Cross-examination:

The value per acre was from $5 to $15 in 1862 and 1863 and along there, at the time they opened the toll road; in 1862 and in the spring or middle of 1863; that value was in some cases without the improvements, and in some cases it was not. Where a man got tired of his place he would sell improvements and everything; the improvements out there were very limited; the improvements upon the Baker ranch were very limited; I have seen them.

Redirect examination:

In a general way I would not give more than $200 or $300 for those improvements, over and above the land; they were a house and some sheds; I know of a shed and house, but in those days they built very poor buildings in that country. I cannot recall how many rooms there were in the house, but I remember seeing it; all of the buildings west of First avenue were very small buildings.

E. M. WILSON, witness for defendant Brickell, sworn, testified:

I reside on Point Lobos and Fourteenth avenues; have resided there since 1863. I went there in 1862, but have lived there since 1863. I know the tract called the Baker tract and knew
152 it in early days, in 1862 and 1863. I knew the value of lands situated as that was in the immediate neighborhood of that, in September 1862. It was $10 an acre.

To the question to which this was an answer plaintiff made the same objections as were made to the same question when put to the witness Blake. Same ruling, same exception. (Exception No. 5.)

I made a purchase about that time; the land that I then purchased was on Fourteenth avenue. I bought it with Mr. McCabe in the spring of 1862, and paid not to exceed $10 an acre for 160

acres; that was on Point Lobos avenue. Between the spring of 1862 and September 1862 there was no material change in the values of lands there. The tract that I bought must be three-quarters of a mile nearer to town than the Baker tract. There was a small house and small barn and shed upon the Baker tract; the fences did not amount to anything. There was some little fencing there, but the fences were brush and some ditches in all of that country. There was very little lumber hauled, except for the Baker house and barn. I built in the fall of 1862; bought the lumber, hauled it out and put up the improvements myself. It was expensive hauling lumber then, for we had no road. I would judge that the improvements on the Baker place would cost anywhere from $500 to $800.

153 Cross-examination:

I was never in the Baker house, but have been past it many times. I would suppose that it contained five rooms and the rooms would be quite small at that; it was a cheaply put up building. The barn was a shed instead of a barn. The house was a cheap built house judging by the appearance outside. There was no lumber in the fences to amount to anything; it was never fenced in and had not been to this day. The house stands there today, the same house; all of the improvements there could have been made, the lumber, expenses of hauling and all, for $800.

Q Did you not testify in this case on the former trial as follows: "In 1863 I had land in the vicinity of Point Lobos road offered to me for $10 per acre and as high as $40"?

A. I think I did; but the *the* land at $40 per acre was much nearer town than where I lived.

They had a little inclosure fenced in about the Baker house in 1862, perhaps 3 or 4 acres; that was all of the fences on the place to amount to anything; there were the remains of old brush fences there; there was not a three-rail fence around the greater portion of the Baker tract in 1862. I am positive of that.

R. H. SINTON, called as a witness for defendant Brickell sworn, testified:

154 I have resided in San Francisco since the 22d of September, 1848 and during that time have been and am now engaged in the real-estate business. In 1862 and 1863 I was a member of the firm of Cobb & Sinton. I knew the Baker tract very well as early as the middle of September, 1862; I then knew, and now remember, the market value of lands situated as that was in its immediate vicinity.

Q. What was the value?

Mr. KELLOGG: I object to the question as incompetent, irrelevant and immaterial under the pleadings.

The court overruled the objection, to which ruling plaintiff duly excepted. (Exception No. 6.)

A. All of that class of lands known as outside lands at that period were almost unmerchantable and of a nominal value; probably $10 an acre; you could buy quantities of it at that price.

Q. What was the value of the Baker tract in 1862?

Same objection; same ruling and exception.

A. $10 an acre would be a full value for it as matters stood at that time.

Cross-examination:

I do not know anything about fences there; in my estimate I did not allow for improvements; I never examined them. There was a house built there and some little outhouses, something of
155 that sort. The house was one of those squatter-houses, a very ordinary kind of building.

J. M. Wood, called as a witness for defendant Brickell, sworn, testified:

In 1862 I was living on the Presidio road in San Francisco. In September I did not know the location of the Baker tract accurately, I had been on it. I know where the house was; I have been there.

Q. Did you then know, and do you now remember about the market value of lands situated as that ranch was in September, 1862?

A. I thought I knew it.

Q. Will you please state what that value then was?

Mr. Kellogg: I object as he has not shown himself competent to give an estimate as to the value of this land. I also object to the question as incompetent, irrelevant and immaterial.

The court overruled the objection, to which ruling the plaintiff excepted. (Exception No. 7.)

A. That is not an easy question to answer. To a man who had such faith and confidence in the Queen City of the Pacific as I had, it was worth a good deal more than it would bring; it was not salable then. My estimate was based only upon general knowledge of that part of the city and of the uncertainty then of the
156 title. I knew of several conflicting claims of title, and it is difficult to separate the actual value of a piece of land, the title to which is uncontested from the same land where there are a number of conflicting claimants of apparently almost equal merit. Some prudent men would not have taken the land for the trouble of fencing it, and I think I was one of those prudent people, partly because I had not the lumber to fence it, and partly because I did not think it was worth fencing under those circumstances; if I had had the money and wanted land, with my idea of the future of the city, I would not have hesitated to pay $25 an acre for it; but not having the money, I never made an offer to Mr. Baker or anybody else. I did not know of any sales made in 1862.

Cross-examination:

I do not in that estimate include the fences and buildings, the house and barn. As to the value of the outfit in the way of fences and barn, outbuildings and house—I do not forget that I built brush fences out there, and it took a great deal of hard work—I would not have undertaken to do all of those things that I saw, and do my own work largely, for less than $5,000; but I am not an expert in those matters.

I was then living on the Presidio road, about three miles from Point Lobos avenue.

157 WASHINGTON MEEKS, called as a witness for defendant Brickell, sworn, testified:

I have resided in San Francisco since 1861; engaged in the business of real estate and loaning money. I know the Baker tract and where it is; in 1862 I had for sale a tract of 300 acres south and west of the Baker tract, on the opposite side of the Point Lobos road. The owners of lands in the neighborhood of the Baker tract in 1862 were Sweeney & Baugh, M. Phelan, Bartlett, Herrick, Whitcomb, Vantine, Isaac Rowel, and George Barstow. I bonded a tract from Isaac Rowel for $15 an acre.

Q. Please state what lands in that vicinity were offered at in 1862.

Mr. KELLOGG: I object to that as incompetent, irrelevant and immaterial, and that the witness is not qualified to testify as to the value.

The court overruled the objection, to which ruling the plaintiff duly excepted. (Exception No. 8.)

A. Land was offered at from $5 to $10 and $15 an acre, plenty of it.

Q. What would you state to be the value of lands situated as the Baker tract was, in September, 1862?

Same objection, ruling and exception.

158 A. According to the asking price and selling price—there was no market value—I should think about $15 or $20 an acre. I did not know anything about any improvements there.

S. S. TILTON, witness for defendant Brickell, sworn, testified:

I have resided in this city and county for about 41 years, and have been in the real-estate business, more or less, for 15 or 20 years. I knew the Baker tract in 1862. I then lived at about the intersection of Scott and Filbert streets, about 3 or 4 miles from the Baker tract.

Q. Did you know in 1862 the market value of lands located as the Baker tract was located, including the Baker tract?

A. I do not know that it had any market value; I mean by that, that it had no fixed value by which you could ascertain what it was worth by what was asked for it, or its intrinsic value. I had

at that time a general idea of the value of lands there, but no positive knowledge. I had conversations at that time with persons owning land in that neighborhood. I knew of the purchase by Mr. Barstow, and by Wilson and McCabe, and three or four other parties, and general conversation.

Q. Do you feel that you knew the place at that time sufficiently well to state a price that it would not exceed in value?

A. Yes, sir, I think so.

159 Q. What do you state to be the value of the Baker tract in September, 1862?

Plaintiff objected to the question, on the ground that the witness was not qualified to answer.

The court overruled the objection; to which ruling the plaintiff excepted. (Exception No. 9.)

A. My judgment would be that $25 an acre would be a full price for it. I remember about the improvements. The tract on its exterior lines, I think, was fenced with brush fence; I don't think there was lumber in it, but there was a small tract around the house, enclosing the house, stables and garden, that might have been from 3 to 5 acres; that was surrounded by a brush fence and one paling of fence lumber and stakes driven to sustain it; that is the only fence that I remember of, excepting a brush fence. I have traveled all over the place without hindrance; I was a dairyman then, and had a cattle ranch, and I have crossed the Baker tract between 1851 and 1865 very many times, and there were no fences to obstruct my passage, except the fence around the improvements that I spoke of, the house and small stable. I knew then about the cost of lumber and materials; I built a house and stables and corrals in 1860; I built a large barn in 1860, 100 feet long and 24 feet wide; I built a house in 1855, and again in 1865. The house upon the Baker tract was very much such a house as I lived in in

160 1851, to the best of my recollection; mine only cost me $350. After I brought my family here in 1853 I built me a cottage that cost me about $1,000; that cottage had four rooms in it and a kitchen on the wing.

The stable on the Baker tract was to the east of the house; it was a low building and looked like a frame put up sufficient to sustain the roof and to be boarded up around the sides. It was very cheap; I am satisfied that it was not shingled, though I am not positive—merely boarded and battened; that might have cost, and probably did cost $150. The house and barn could not have cost more than about $600.

EDWARD KNIGHT, witness for defendant Brickell, sworn, testified: I have been a resident of San Francisco since 1852, and acquainted with the Baker tract since 1855. I knew John H. Baker in his lifetime. In 1862 there was on the Baker tract a rude sort of a house, a skeleton fence, and a few sheds around it; I remember the fence there; it was a sort of skeleton fence. I was at that time in the dairy business; I lived at Marlin Lake, within a quarter of a

mile of the Baker tract, and was engaged in the dairy business. I remember the improvements on the Baker place in September, 1862.

161 I had knowledge of the value of such materials as entered into that house and the fences then. I had bought a great amount of lumber that year; had sent out in that locality 75,000 feet of lumber; I was building a fence around that section of the country for George H. Barstow and others.

Q. What would be your estimate of the value of the improvements upon the Baker tract in September, 1862?

Mr. KELLOGG: I object to the question as incompetent, irrelevant and immaterial, and the witness has not been shown competent to answer.

The court overruled the objection, to which ruling plaintiff duly excepted. (Exception No. 10.)

A. I should not say that they would much exceed $300 or $400 at the outside; they were of very rude construction.

Cross-examination:

I have built a great many houses in my life, and a rough structure of that character—a squatter's house—is very cheaply put up—boards nailed up endwise and such as that.

CHAS. H. REYNOLDS, witness for defendant Brickell, sworn, testified:

162 I have lived in this city and county since 1860; I was in the banking business in 1860, and have been in the real-estate business since 1864. I know the Baker tract and its location; I have been familiar with the lands since October, 1863; I own land in that vicinity at the present time; I bought it in October, 1863; it is known as the McHenry ranch, about two or three thousand feet from the Baker tract, and on the Point Lobos road. I bought a quarter of the 160 acres; my deed is dated October 1st, 1863; it was of the same general character of land as the Baker ranch.

Q. Do you remember what the market value was about the time that you bought?

A. I know what I paid for it.

Q. What did you pay for it?

Mr. KELLOGG: I object to that question as incompetent, irrelevant and immaterial.

The court overruled the objection, to which ruling plaintiff excepted. (Exception No. 11.)

A. I paid $600 for forty acres—$15 an acre. There were no improvements upon the property that I bought, except that the tract was fenced; that price included the land fenced.

GEORGE TURNER, witness for defendant Brickell, sworn, testified:

The number of acres described in the inventory of the estate of John H. Baker is 132.70. The whole number of acres in the whole

Baker tract, as described in the homestead, is 220½ acres, and the exception 46.09 acres, leaving a balance of 174.41 acres.

163 F. B. AUSTIN, sworn and examined for the defendant Brickell, testified:

I have resided in this city ever since 1849. I was one of the originators of the Point Lobos road now known as the Cliff House road; it was finished in 1862 or 1863. I knew of the Sweeney and Baugh claim and of the George Barstow claim. We did not consider the outside lands hardly in the market in 1863. There was no sale. There was no market value to the property. It was worth something, because I myself bought possessory titles. I was brought into frequent contact with those outside land-owners. There are fifteen different tracts that I purchased. I had an intimate acquaintance with many of the outside land-owners in 1863. I had an approximate knowledge of the value of the property.

In those days I had 225 acres of outside land.

GEORGE H. FERGUSON, sworn as a witness for defendant and examined, testified:

I am a surveyor and deputy in the city and county surveyor's office. I have examined the descriptions in the inventory of the John H. Baker estate, the descriptions in the city deed to Maria Baker, put in evidence, and the descriptions in the homestead declaration made by Maria Baker, in evidence in this case; and have made examinations as to the location and quantities of the land in each of those documents.

164 The lands described in the city deed are included in the inventory description and in that of the homestead declaration.

The lands described in the inventory embraced 212½ acres. The homestead is made to include 138½ acres, by deducting the exceptions which it mentions as not being including in the homestead claim. The city deed is inside of the homestead lines, but embraces only a portion of the 138½ acres. I cannot state accurately the quantity in acres. It includes the streets between the blocks into which it is now divided.

The defendant Brickell thereupon offered in evidence, from the Abstract, page 181, the assignment of the Maurice Dore, mortgage, first to Lewis Levison, dated April 18, 1873; second, by Lewis Levison to the California Savings and Loan Society, dated October 2d, 1873, and the cancellation by certificate of release, of that mortgage, made by Levison, August 18th, 1874, and recorded respectively in Liber 65 of Releases, pages 88 and 90. Also, a deed of reconveyance by E. W. Burr and Benjamin Dean, trustees, under a deed of trust made by Maria Baker to them to secure the loan made by the Savings and Loan Society appearing upon page 184 of the Abstract, dated June 1st, 1874, and recorded June 2d, 1874, in Liber 741 of Deeds, page 111. Also, from page 210½ of the Abstract and
165 the following page, cancellation of the mortgage made by Batchelder and wife to John Brickell, June 1st, 1874. This

release is dated April 25th, 1876, and recorded February 16th, 1877, in Liber 74 of Releases, pages 354 and 357.

Defendant rests.

Plaintiff's Evidence in Rebuttal.

EDWARD MAHER, witness for plaintiff, sworn, testified:

I have lived in San Francisco since 1852. I know the Baker tract and knew it in 1862. I knew John H. Baker in his lifetime. For five or six months prior to Baker's death the Baker tract was all fenced in; the improvements on the property consisted of three wells, a barn, stable, and also a dwelling-house; the fence around the tract was a good substantial one; the house was new when he put it up first. I have built houses; at that time lumber was expensive and had to be hauled out through the sand as there was no road then. I would estimate the value of the Baker house, barn and the improvements around there; in 1862, to have been some $3,000 or $4,000 possibly. As to the value of lands in 1862, near and around the Baker tract, there were not many sales in those days, but according to my own ideas at that time, the land
166 was considered—there not being much demand for it—worth about $50 or $60 or $70 an acre.

Cross-examination:

I do not know the price of lumber in 1862; at that time I had charge of the station at Point Lobos and also a ranch. I had charge of the station at Point Lobos connecting with a telegraph to the Merchants' exchange; the marine station; I was kept there closely all day; but there were several others. I had charge, and there was an assistant also.

I do not know of any lands selling about there in 1862. What I say as to the value of the lands is merely my own ideas; it is not derived from any knowledge of any sales; only a general knowledge of what land was worth there. I should estimate the value of the house alone to be perhaps $2,000; I should think it would cost about that to build it then, including the getting of the lumber out there; I did not know the price of lumber then, but I knew the value of houses generally, or what they would cost, but as far as details go, I did not understand them. In my opinion, all of the improvements upon the Baker tract in 1862 added between $4,000 and $5,000 to its value; that is only my idea; it may not be true; my idea formed from a general knowledge or general average of a man's ideas; I say this with only a general knowledge of the prices.

167 M. S. COOK, witness for plaintiff, sworn, testified:

I have lived at Lone Mountain, in the city and county of San Francisco, since 1853. I know the Baker tract; I knew it in 1862; I lived close to it; I knew the value of land in that vicinity in 1862; in my estimation the Baker tract in the latter part of 1862

was worth $50 an acre at the lowest; it was a fine location and would attract anybody's attention; then I suppose, at a fair market value, it was worth $75 per acre; there was a house and barn upon the property; I cannot say how much the house was worth; it was not a very expensive house; it was an ordinary house; I would estimate it at $500, and the barn at about $150 or $200, I guess. I was often inside the house; a part of it was papered inside, I think; it was all cut up into rooms and partitions; I was not over all of it.

Cross-examination:

There was a great deal of open land all around the Baker tract; I made some sales myself at Lone Mountain in 1862; Lone Mountain is a mile and a half this side of the Baker tract. I know of sales made right around the Baker tract in 1862, within half a mile or a quarter of a mile; there was a good many little sales of lands made, but I cannot tell you who they were sold to, but when
168 they were made we could tell. I do not know the price of any land sold in 1862; I know there were several small sales, but I cannot remember the price of any nor the tract sold. I was in the milk business in 1862, and was living near Lone Mountain, right under the cross there.

JOHN HANNAN, sworn and examined for plaintiff, testified:

I have lived on Point Lobos avenue since 1863. In 1863 I bought one-third of 117 acres at $400, nearly $10 per acre. Bought of James Phelan part of the Phelan and Vantine tract. You might say I was made a present of it. I do not know the values of lands in 1863 or 1864. The cost of hauling as far as the Baker tract in 1863 and 1864 was from $5 to $8 per thousand.

In 1862 and 1863 the average value of land near the Baker tract was in 1862 $50 per acre, and in 1863 $100 per acre. There was a sale of Lundberg to Jeremiah Buckley in 1863, 25 acres for $2,500, so I heard. The place had a house on it, and was fenced. Taggard, my partner, whose son has testified here, sold his one-third interest in one hundred and seventeen and one-half acres for $1,600, in October, 1863, so I heard.

Cross-examination:

The sale I have spoken of from Lundberg to Buckley, and the sale by Taggard were the only two sales I knew of the prices of 1863.

169 JAMES RILEY, witness for plaintiff, sworn, testified:

I have lived in San Francisco forty years. I knew the Baker tract in 1862. I have an idea of the value of the property in that neighborhood in 1862. There was then no set value upon property; it was owing to who had it for sale, and their necessities; some sold at one price and some at another. I had general information and knowledge as to values there then; I used to hear what was going on. In 1862 I had an agreement made for fifty dollars

an acre with two gentlemen in the city, a Mr. Mastick and Capt. Thomas, and I consider that the fair market value of the land at that time; there was very little selling.

Cross-examination:

I sold land to John Hannan in 1862 or 1863; gave it away nearly; I cannot remember whether it was in 1862 or 1863. In 1862 or 1863 Mr. Baker made an agreement to sell a quantity of land with Mastick and Capt. Thomas, at $50 an acre. The sale was made and $200 was paid to Mr. Baker on account; but the agreement fell through; the sale was not made after all; they were satisfied with the price, but there was some other difficulty. I testified about this same land before on the former trial. I might have testified then that there were 255 acres in that tract; if
170 I did, that was correct, but I don't remember. This is the same property, or a part of the same property, as to which I testified before.

Q. Was it to one James Wood that the sale was to be made?

A. I think it was, to the best of my recollection.

Q. Do you remember the price?

A. $50 an acre.

Q. How do you make that out? Was not the price $6,275 for the whole, and did you not so testify?

A. I testified that the price was $50 an acre.

Q. Did you not testify that the price was to be $6,275?

A. I don't remember what I did testify now; but the agreement will show.

Q. Did you not testify there that in 1862 Mr. Baker was negotiating for a sale of his tract to James Wood at $7,275?

A. I might have.

Q. Is that the same transaction you refer to now?

A. Yes, sir, that is part of the same. I do not remember whether I testified that there was supposed to be 255 acres in that identical tract; I do not remember the exact amount; if I testified that way before it was probably correct.

Q. Don't you know that that would only make $25 an acre?

171 A. I don't remember whether I did so testify.

Q. You had only one transaction with reference to the Baker tract in 1862?

A. That is all, sir.

Q. It is the same transaction, whether it is the value you mentioned before, or the value you testify to today?

A. I presume it is the same.

Q. You had but one for Baker?

A. That is all.

MILO HOADLY, being sworn and examined for plaintiff, testified:

I have been a surveyor in California and at San Francisco ever since 1850. I knew in 1863 the location of the Baker tract, and knew in a general way the value of outside lands in 1863 from mak-

ing many surveys and hearing sales talked about. I did not know the price of any particular sales. I would estimate the value of the Baker tract in 1863 at $100 per acre.

On cross-examination the witness testified:

I am not able to mention any sale made in 1863 of outside lands. I cannot say as to a single sale, who sold or bought, or at what price a sale was made in 1863, or 1864 or 1862, of lands near the Baker tract, or of any outside lands. Most of the land in that neighborhood lay open and without fences in 1863—thou-
172 sands of acres. There were no titles for a number of years after for those lands.

E. D. SAWYER, witness for plaintiff, sworn, testified:

I knew the Baker tract in 1862. At that time I was a member of the firm of Porter & Sawyer; the firm acquired a small interest in that land. I knew something about the value of land in that vicinity in 1862. The value then was very little compared with its subsequent value. I knew what Mr. Baker paid for it, because I helped him furnish the money, but that was some years before this. I should say that fifty dollars an acre was the full value in 1862; that is for the land fenced, but without the house and barn.

Cross-examination:

I have no recollection now of what the price of land around there was in 1862; there were some sales made about that time, but very few. I think all of these lands had a special price; that I could go and buy them for a special price and not under a certain price; but the lands were very low everywhere else then. The Baker tract was well fenced, and other tracts were well fenced, but the tracts were so large it looked very much like an open country; there were fences, for a great many tracts were fenced up; they thought it was necessary to keep their tracts fenced to hold them and
173 to keep squatters from getting onto them. I have frequently ridden over it on horseback, and very often we had to get down and take down the bars to get through. There was a great deal of land fenced all through the Western addition. I don't know of any fence between Point Lobos road and the Baker tract, but there were portions of tracts bordering on Point Lobos road that were not fenced.

I do not remember any particular sales; but I knew the sales then; these were occasional transactions, and sometimes I would inquire the value of lands, but I could not now state any particular specific sale; it has been so long it is washed out of my mind. I knew at the time of Mr. Baker's purchase how much he paid; my recollection is that he paid $900 and I gave him $500; that was in 1860; between that time and 1862 there had been a change in the Baker tract; Baker fenced his tract and put on a house and barn and did some cultivation. I think there had been in that time an upward tendency in the value of the land. I would not place the Baker tract in 1862—after it was fenced and a house upon it—the

house was common, and a small barn—I could not place it less than $50 an acre. I don't remember any transactions in tracts of this size at $50 an acre in 1862. Mr. Porter and I took that 10
174 acres from Mr. Baker in 1862 at fifty dollars an acre; we took that as a fee of $500, for services rendered; we took it because Mr. Baker had no money; we gave full value for that land.

Mr. KELLOGG: We offer in evidence the case of Maria B. Batchelder against Adam S. B. Baker, No. 20431, in the fourth district court; the notice of appeal from the judgment entered in said action on the 23d of January, 1886, by the defendant, to the supreme court of this State, which notice is dated January 27th, 1886, and served on that date on the attorneys for the defendant, with the affidavit of service endorsed thereon, filed on the same date.

I also offer in evidence an undertaking filed in said action, No. 20431, filed on the same day.

Here the plaintiff in rebuttal rests.

The foregoing was all the testimony introduced at the trial, and the said cause was afterwards argued and submitted to the court; and, after the same had been under advisement, the court made and signed and filed its decision and findings of fact and conclusions of law in favor of, and ordered decree in favor of the defendant Brickell and against the plaintiff; and thereafter, within the time allowed by law, the plaintiff served and filed his notice of intention to move the court to set aside and vacate its said decision and to grant plaintiff a new trial of said action upon the following grounds:

175 I.

Insufficiency of the evidence to justify the decision of the court.

II.

Insufficiency of the evidence to justify the findings of fact and conclusions of law.

III.

That said decision is against law.

IV.

That said findings are against law.

V.

Errors of law occurring at the trial and excepted to by the said plaintiff.

Which notice of motion further stated that the same would be made upon a statement of the case, and which notice of motion is in the words and figures following, to wit:

"(Title of Court and Cause.)

To the clerk of said court and to the defendant John Brickell, and to Messrs. E. J. and J. H. Moore, attorneys for defendant John Brickell:

Please take notice that the plaintiff in the above-entitled action intends to and will move the court above entitled to set aside and vacate the decision of the court herein, and also the findings of the court, heretofore rendered, signed, and made and filed in said
176 action in favor of the defendant John Brickell and against the plaintiff and for a new trial in the said action above entitled, and that such motion will be made upon the following grounds, to wit:

I.

Insufficiency of the evidence to justify the decision of the court;

II.

Insufficiency of the evidence to justify the findings of fact and conclusions of law;

III.

That the said decision is against law;

IV.

That the said findings are against law;

V.

Errors in law occurring at the trial and excepted to by the plaintiff;

And further be notified that the said motion will be made upon a statement of the case hereafter to be signed, served and filed according to law.

Dated June 28th, 1892.

FOX & KELLOGG,
Attorneys for Plaintiff."

Which said notice of motion was duly served upon the attorneys for the defendant John Brickell, and filed in said action, both on June 28th, 1892.

177 And now, upon the foregoing statement, the plaintiff assigns the errors of law, hereinafter set forth, upon which he will rely in his said motion, and also specifies the particulars, hereinafter set forth, in which the evidence was and is insufficient to justify the said decision of the court, and also the findings of fact and conclusions of law made by the court, and also specifies the particulars wherein the said decision and also the said findings are against law, as hereinafter set forth.

Insufficiency of the Evidence to Justify the Decision, and Also the Findings of Fact and Conclusions of Law.

1. That from the evidence the court should have decided and found that on July 10th, 1860, James C. Garner granted and conveyed the said Baker tract to John H. Baker for the sum of $300, cash, actually paid.

2. That from the evidence the court should have decided and found that on July 10th, 1860, said John H. Baker went into peaceable possession and occupation of the whole of said Baker tract, and so continued till his death, and that the defendant Maria, as administratrix of his estate, and not otherwise, continued such possession from the time of his death, and the grant of letters of administration to her, till she was ousted by the defendant Brickell.

178 3. That the evidence is insufficient to sustain the decision and finding No. II that said John H. and Maria Baker ever executed a declaration of homestead on said Baker tract, or any thereof, in due form of law, or otherwise, or recorded the same.

4. That the evidence is insufficient to sustain the decision and the finding that plaintiff was born June 21st, 1861.

5. That the evidence is insufficient to sustain the decision and the finding (No. V), that the descriptions of land and premises in said alleged declaration of homestead and in said petition for administration, and in the said inventory in the estate of John H. Baker, deceased, were intended to include and do include all the lands described in subdivision 8 of the said findings.

6. That the evidence is insufficient to sustain the finding and the decision that at the time of the recording of said alleged declaration of homestead, and also of the death of said John, the said lands, in said alleged declaration described, were, exclusive of the improvements, only worth $5,540, and said improvements thereon were then only worth $1,500.

7. That the evidence is insufficient to justify the finding and decision that said Maria was in possession of said realty at and before the time she was so appointed administratrix, and that

179 she did not, as such administratrix, enter into possession of said real property or any part thereof. (No. VI.)

8. That the evidence is insufficient to justify the finding and the decision that said Maria claimed to hold the said Bryant Street property in her own right. (No. VII.)

9. That the evidence is insufficient to sustain the finding and the decision that said exchange for said Bryant Street lot was not a fraud on the estate and heirs of said John H. Baker.

10. That the evidence is insufficient to sustain the finding and the decision that said Maria claimed to be in possession or entitled to the possession of said Baker tract in her own right, or to be the party entitled to a city deed therefor, under said act of Congress, or said statutes of the State of California, or said laws or ordinances of said city and county, or, in due form of law, petitioned said board of supervisors, under said order No. 800, for a grant or city deed

of the same, or that under such petition such proceedings were duly and regularly had as that a grant was made to her, in accordance with such petition, of said lands described in finding No. VIII, or any thereof.

11. That the evidence is insufficient to sustain the finding and the decision that said Maria did not, at the time of making such application and at the time of obtaining said deed, wrong-
180 fully or fraudulently, or at all, conceal any fact as to her possession of any of said lands, nor wrongfully or fraudulently claim, or pretend that she was in possession thereof, or entitled to possession thereof in her own right, and was the party entitled to a city deed thereof under said act of Congress, and statutes and ordinances, and that she did not otherwise than justly, in her own right, petition for and obtain the said deed from said city and county. (No. VIII.)

12. That the evidence is insufficient to justify the finding and decision that the cost of procuring said title from said city and county was not, nor was any part thereof, nor the cost of the management and care of said property, or any part thereof, paid out of said estate of John H. Baker. (No. VIII.)

13. That the evidence is insufficient to justify the finding and decision that the note and mortgage to Maurice Dore were paid by defendant Brickell out of moneys loaned by him to said Maria.

14. That the evidence is insufficient to justify the finding and the decision that at the time of said mortgages to said Brickell, or at any other time, the said lands, or any thereof, were not the property of the estate of J. H. Baker, or his heirs-at-law, or any of them, but were all the separate and individual property of said Maria.

15. That the evidence is insufficient to justify the finding
181 and the decision that said defendant Brickell did not commence or prosecute said foreclosure suit with or in pursuance of any intent to cheat or defraud the plaintiff, or with any other intent than to obtain a just and legal and equitable right, and that said Brickell has not, at any time, wrongfully or fraudulently claimed to be the owner of said property, and that he has and does rightfully claim to be the owner of said lands and all thereof; that he did not, on January 1st, 1880, or at any other time, wrongfully take possession of said property, or any thereof, or wrongfully oust the plaintiff therefrom, and that he has not at any time wrongfully kept, or now wrongfully keeps, the plaintiff so ejected therefrom; and that he has not wrongfully denied, and does not wrongfully deny the plaintiff's interest therein. (No. X.)

16. That the evidence is insufficient to justify the finding and the decision that said Brickell did not, at the time of the death of said Baker, or at any time from thence to the commencement of this action, or ever, well or at all, know or have knowledge that said John H. Baker died seized and possessed of said Baker tract, and that the same and all thereof was the property of his estate; and that he did not, at the time of the execution to him of said notes and mortgages, know of the existence of plaintiff and the several

children of said John H. Baker, and that he did not, prior to
182 and at such execution of said notes and mortgages, know of the appointment of said Maria as such administratrix or of the making and filing of said inventory, or of the jurisdiction attempted to be exercised by the said probate court over said real estate, or of the sale of a portion thereof under said order of court, or of the application of the proceeds of such sale to the payment of expenses of administration and claims against the estate of said John H. Baker, and that all the knowledge which he acquired in the premises, connected with such administration, was such as he subsequently derived from said abstract of title, and that he did not know and have knowledge that said real estate on Bryant street was received by said Maria in exchange for a portion of said Baker tract and in trust for said estate, and that the title acquired under said deed of January 9th, 1873, was acquired and held by her in fraud of the rights of said estate and the heirs-at-law of said deceased, and that he did not take or accept said mortgages, or any of them, with knowledge of all or any of the facts in plaintiff's complaint set forth. (No. XII.)

17. That the evidence is insufficient to justify the finding and the decision that in said action in said fourth district court such proceedings were regularly and duly had that judgment and decree of said court was duly rendered, given and made therein on
183 August 15th, 1876, in favor of the plaintiff therein against the defendant therein, and that it was adjudged and decreed therein that said Adam had no title or estate in said lands or any thereof, and that said Maria was the owner thereof, and had good and valid title thereto, and that said Adam be enjoined from setting up any claim therein, and that said judgment and decree has become and is final, and that the same has been affirmed by the supreme court of the State of California. (No. XIII.)

18. That the evidence is insufficient to justify the finding and the decision that said Brickell did not, on May 13th, 1876, or at any other time, contrive or intend to cheat or defraud the plaintiff herein; and that he did not, on May 13th, 1876, or at any other time, ever, with intent to cheat or defraud the plaintiff, or otherwise, or at all, retain counsel to bring such suit to quiet title, or procure, or cause said suit to be brought, or cause the complaint in said action to be filed, or have any connection or agency whatever in bringing said suit, or cause the same to be brought or prosecuted; and that he did not fraudulently or at all procure summons to be issued and returned with said affidavit of service thereon. (No. XIII.)

19. That the evidence is insufficient to justify the finding and the decision that the summons in said action was duly and personally served, on May 13th, 1876, at said city and county,
184 upon said Adam, and that due proof was made of such service, and that it is not true, as appears in the complaint herein, that said Adam never had any knowledge of such suit or proceedings therein until May, 1885, or that he then, for the first time, learned thereof. (No. XIII.)

20. That the evidence is insufficient to justify the finding and the

decision that said Adam duly appeared in said action, as in like cases provided by law, through his guardian *ad litem*, regularly appointed; and that said district court acquired and had jurisdiction over his person to make and enter said decree. (No. XIII.)

21. That the evidence is insufficient to justify the finding and the decision that said defendant Brickell did not, with intent to cheat and defraud plaintiff, or at all, procure counsel to appear on his behalf, or for any purpose, in said action, and that no counsel procured or paid by him did so appear. (No. XIII.)

22. That the evidence is insufficient to sustain the finding and the decision that none of the proceedings in said action to quiet title were fraudulent or done to cheat or defraud said Adam; and that none of the proceedings therein, on the part of said Maria, were fraudulent or done with the intent to cheat or defraud the said Adam. (No. XIII.)

23. That the evidence is insufficient to justify the finding
185 and the decision that none of the allegations of the complaint herein are true, which charge said defendant Brickell with fraud, or intent to cheat or defraud, or that charge him with knowledge of fraud committed by said Maria. (No. XIV.)

24. That the evidence is insufficient to justify the finding and the decision that none of the land in dispute was ever acquired or held by said Maria in trust for the estate or for any heir-at-law of said John H. Baker, deceased. (No. XV.)

25. That the evidence shows, and it is established by the evidence, that the estate of John H. Baker, deceased, and his heirs-at-law were and are the beneficiaries mentioned in and intended by said act of Congress, and said statutes of the State of California, and said laws and ordinances of said city and county, and, thereunder, were and are entitled to the said Baker tract, and all thereof; and that under said act of Congress, and said statutes, laws and ordinances, the said plaintiff is entitled to the undivided one-twelfth ($_1{}^1{}_2$) of all said Baker tract and one-twelfth ($_1{}^1{}_2$) of all said lands described in said city deed.

That said decision and findings are against law because—

I.

Of specifications hereinabove recited under the head of insufficiency of evidence;

186 II.

Of the errors of law hereinafter recited in this statement;

III.

From the facts found in the said findings of fact, the decision herein and also the conclusions of law herein should have been in favor of plaintiff as prayed in his complaint;

IV.

Under and by the terms of said act of Congress, the plaintiff herein, as one of the heirs-at-law of said John H. Baker is entitled to one-twelfth, undivided, of the land described in said city deed.

V.

It appears from the evidence that the said defendant Brickell, before the execution of said notes and mortgages to him and the making of said loans by him, well knew and had notice of all, each and every of the facts contained and charged in the allegations of the complaint herein and of the amendments to said complaint and the supplemental complaint herein.

Errors of Law Occurring at the Trial and Excepted to by the Plaintiff.

I.

187 The court erred in overruling plaintiff's objection to the question, "Will you state your recollection about the manner in which your loans came to be made to Mrs. Batchelder; the first loan and the subsequent loan?" put to the witness Brickell on his own behalf, and designated in the foregoing statement as exception No. 1.

II.

The court erred in overruling plaintiff's objection to and in admitting in evidence the complaint, summons, return of service, order appointing C. T. Botts guardian *ad litem*, answer, findings and decree and remittitur of the supreme court, to wit: the judgment-roll in the said action of Batchelder *vs.* Baker, referred to in the foregoing statement as exception No. 2.

III.

The court erred in overruling plaintiff's objection to and in admitting in evidence the said alleged declaration of homestead by John H. Baker, his wife, referred to in the foregoing statement as exception No. 3.

IV.

The court erred in overruling plaintiff's objection to the question: "What was it?" put to the witness P. H. Blake, and designated in the foregoing statement as exception No. 4.

V.

188 The court erred in overruling plaintiff's objection to the question, to which the following was an answer, namely: "It was worth $10 an acre," put to the witness E. M. Wilson, and designated in the foregoing statement as exception No. 5.

VI.

The court erred in overruling plaintiff's objection to the question, "What was the value?" put to the witness R. H. Sinton, and designated in the foregoing statement as exception No. 6.

VII.

The court erred in overruling plaintiff's objection to the question: "Will you please state what that value was then?" put to the witness J. M. Wood, and designated in the foregoing statement as exception No. 7.

VIII.

The court erred in overruling the objection of plaintiff to the question: "Please state what lands in that vicinity were offered at in 1862?" put to the witness Washington Meeks, and designated in the foregoing statement as exception No. 8.

IX.

The court erred in overruling plaintiff's objection to the question: "What do you state to be the value of the Baker tract in September, 1862?" put to the witness S. S. Tilton, and designated in the foregoing statement as exception No. 9.

189 X.

The court erred in overruling plaintiff's objection to the question: "What would be your estimate of the value of the improvements upon the Baker tract in September, 1862?" put to the witness Edward Knight, and designated in the foregoing statement as exception No. 10.

XI.

The court erred in overruling plaintiff's objection to the question: "What did you pay for it?" put to the witness Chas. H. Reynolds, and designated in the foregoing statement as exception No. 11.

FOX & KELLOGG,
Attorneys for Plaintiff.

The foregoing statement of the case is hereby settled and allowed as above engrossed.
Dated April 6th, 1893.

JOHN HUNT, *Judge.*

The above is correctly engrossed and may be signed.
Dated April 6th, 1893.

FOX & KELLOGG,
Att'ys for Pl'ff.
E. J. & J. H. MOORE,
Att'ys for Def't Brickell.
A. N. DROWN,
Att'y for Def't Brickell.

190 (Title of Court and Cause.)

Notice of Motion to Vacate and Set Aside Decision and Findings and for a New Trial.

To the clerk of said court and to the defendant John Brickell and to Messrs. E. J. and J. H. Moore, attorneys for defendant John Brickell:

Please take notice that the plaintiff in the above-entitled action intends to and will move the court, above entitled, to set aside and vacate the decision of the court herein, and also the findings of the court, heretofore rendered, signed and made and filed in said action in favor of the defendant John Brickell and against the plaintiff; and for a new trial in said action above entitled; and that such motion will be made upon the following grounds, to wit:

I.

Insufficiency of the evidence to justify the decision of the court;

II.

Insufficiency of the evidence to justify the findings of fact and conclusions of law;

III.

That the said decision is against law;

IV.

That the said findings are against law;

191 V.

Errors of law occurring at the trial and excepted to by the plaintiff.

And further be notified that the said motion will be made upon a statement of the case, hereafter to be signed, served and filed according to law.

Dated June 28th, 1892.

FOX & KELLOGG,
Attorneys for Plaintiff.

(Endorsed:) Service of copy of the within is hereby admitted this 28 day of June, 1892. E. J. & J. H. Moore, attorneys for defendant Brickell. Filed June 28, 1892. Wm. J. Blattner, clerk, by G. R. Butler, deputy clerk.

(Title of Court and Cause.)

Minute Order Denying Plaintiff's Motion for New Trial.

FRIDAY, *April 14th*, 1893.

In this cause the plaintiff's motion for a new trial came on regularly to be heard this day, Messrs. Fox & Kellogg appearing as

counsel for the plaintiff, and Messrs. Moore & Moore att'ys appearing on behalf of defendant. After argument by respective counsel, and the court being fully advised in the matter it is ordered that said motion for a new trial be and the same is hereby denied.

(Title of Court and Cause.)

Notice of Appeal.

You will please take notice that the plaintiff in the above-
192 entitled action hereby appeals to the supreme court of the State of California, from the judgment therein entered, in the said superior court, on the seventeenth day of June, 1892, in favor of the defendant Brickell in said action, and against said plaintiff, and from the whole thereof, and also from the order denying said plaintiff's motion for new trial, made and entered in the minutes of said court the fourteenth day of April, 1893.

Dated this 1st day of June, 1893.

Yours, &c., FOX & KELLOGG,
Attorneys for Plaintiff.

To the clerk of said superior court; and E. J. & J. H. Moore, attorneys for defendant Brickell.

(Endorsed:) Filed June 1, 1893. M. C. Haley, clerk, by J. M. Sullivan, deputy clerk. Service and receipt of a copy hereof admitted after filing this 1st day of June, 1893. E. J. & J. H. Moore, attorneys for def'ts.

(Title of Court and Cause.)

Stipulation.

It is hereby stipulated that the foregoing is a full, true and correct transcript on appeal from the judgment and from the order denying plaintiff's motion for a new trial in the above-entitled action, and that a good and sufficient undertaking on appeal, and from said judgment, and on said appeal from said order denying
193 plaintiff's motion for a new trial, both staying execution and for costs in due form of law, was on the 2d day of June, 1893, duly filed in said action.

Dated this — day of ——, 1893.

——— ———,
Attorneys for Appellant.

——— ———,
Attorneys for Respondents.

(Title of Court and Cause.)

Certificate of Clerk.

I hereby certify that the foregoing printed pages constitute a true, full and correct copy of the papers on file in this action, and of the orders therein made purporting to be contained in said

pages, and that sufficient undertaking in due form of law on appeal from the judgment and from the order denying plaintiff's motion for a new trial in this cause, was filed in due time in said cause.

In witness whereof, I have hereunto set my hand and affixed the seal of said superior court this 22nd day of July, 1893.

[SEAL.] M. C. HALEY, *Clerk*,
By W. J. HENEY.

194 Service hereof admitted this 27th day of July, A. D. 1893.
A. N. DROWN,
Att'y for Respondent Brickell.

STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

B. J. Ackerman, being first duly sworn, deposes and says that he is upwards of the age of twenty-one years; that he is not a party to the above-entitled action; that he is competent to be a witness for either party thereto; that on the 27th day of July, 1893, he served the foregoing transcript on appeal on E. J. and J. H. Moore, attorneys for defendant Brickell, by personally delivering to E. J. Moore personally a true copy of said transcript, at his office, in the city & county of San Francisco.

B. J. AKERMAN.

Subscribed & sworn to before me this 27th day of July, 1893.
GEO. T. KNOX,
[SEAL.] *Notary Public.*

195 In the Supreme Court of the State of California.

ADAM S. B. BAKER, Plaintiff and Appellant, }
vs. }
JOHN BRICKELL, Defendant and Respondent, and MARIA BAKER BATCHELDER, Defendant. }

Opinion of the said supreme court as follows:

"Filed June 5, 1894. Appeal from the superior court of San Francisco Co.; John Hunt, J.

"For app't, Fox & Kellogg; for resp't, E. J. & J. H. Moore, A. N. Drown.

"Department One.

"ADAM S. B. BAKER, Appellant, }
vs. } No. 15435.
"JOHN BRICKELL, Respondent. }

"The plaintiff brought this action to establish a trust in certain lands in the city and county of San Francisco against the defendant Brickell. Maria Baker Batchelder, the mother of plaintiff, was made a party plaintiff, but failed to appear, and her default was duly entered. The case was tried and judgment given and entered

in favor of the plaintiff. From that judgment and an order denying his motion for a new trial Brickell appealed to this court, where the judgment and order were reversed and the cause remanded. Baker *vs.* Brickell, 87 Cal., 329. When the case went back to the trial court the plaintiff filed an amendment to his complaint,
196 and also a supplemental complaint. The defendant demurred to the supplemental complaint, and his demurrer was sustained. The case was then again tried, and the findings and judgment were in favor of the defendant; from which judgment and an order refusing him a new trial the plaintiff prosecutes this appeal.

"In the opinion delivered on the former appeal the facts of the case are very fully stated, and the law applicable thereto is declared; and in the late case of Whelan *vs.* Brickell, 33 Pac. Rep., 396, an action prosecuted by the administrator of the estate of plaintiff's father, that decision is referred to and approved. In the record presented on this appeal the facts are the same as on the former appeal, and the decision on that appeal must therefore be treated as the law of the case and be followed here.

"The amendment to the complaint stated no new facts and added nothing material to the amended pleading. The averments were simply of rights resulting from facts already stated.

"The demurrer to the supplemental complaint was properly sustained.

"In his original complaint plaintiff alleged that in May, 1876, an action was commenced against him, then a minor about fourteen years of age, in the name of his mother, Maria Baker Batchelder, as plaintiff, to quiet her title to the land now in controversy, and that in August, 1876, 'a judgment and decree of the court was ordered and signed, quieting the title of the plaintiff in said action against this plaintiff as defendant therein.' The complaint makes various charges of fraud on the part of the defendant Brickell in the institution and prosecution of that action, which, as found by the court in this case, were wholly without foundation and false. An
197 appeal was taken *were wholly without foundation and false. An appeal was taken* by the defendant in that case, and in May, 1889, the judgment was affirmed. Batchelder *vs.* Baker, 79 Cal., 266.

"The supplemental complaint avers 'that since the commencement of this action and during the progress of the first trial thereof * * * said defendant, Brickell, at his own cost and expense and without the consent or knowledge or authority of said Maria Baker Batchelder, caused said decree in said action' of Batchelder *vs.* Baker 'to be entered, and that such entry was the first entry of said decree ever made and was more than ten years after the signing thereof, and that such entry of said decree was ordered by the attorneys herein of said Brickell, and, being so ordered and made without the consent or knowledge or authority of said Maria Baker Batchelder, was and is fraudulent and void and of no force or effect whatever, and that for the reasons above stated and in plaintiff's complaint in this behalf stated all pro-

ceedings in said action last named were and are fraudulent and void.'

"A supplemental complaint must allege 'facts material to the case occurring after the former complaint.' (Sec. 464, C. C. P.)

"No facts material to the case are alleged in the supplemental complaint here. In the original complaint it is stated that a judgment and decree of the court was ordered and signed, and the evidence introduced by the plaintiff shows that findings and decree were signed by the judge and filed September 1, 1876. It was then and thereafter the ministerial duty of the clerk to enter and docket the judgment and to prepare and file the judgment-roll (secs. 633, 668, 670–672, C. C. P.), and he could not by neglecting to perform that duty destroy or impair the effect of the judgment. Casement *vs.*
198 Ringgold, 28 Cal., 335; *In re* Newman, 75 Cal., 213; *In re* Cook, 77 Cal., 220. It was therefore immaterial who set the clerk in motion to discharge his ministerial duty or who paid him his fees therefor. He might perform his duty of his own motion, or the court could direct him to do it, or any party interested in having it done could procure him to do it. Here it appears that Brickell was interested in having the judgment entered, for it is charged in the complaint that through the mortgages Mrs. Batchelder and her husband had given him and the foreclosure of those mortgages and the sale by the sheriff under the decree of foreclosure and the purchase at such sale he had acquired all the estate or interest of Mrs. Batchelder in and to the lands in question. This was in November, 1878, and the 'consent,' 'knowledge,' or 'authority' of Mrs. Batchelder that the judgment be entered in January, 1887, was clearly not necessary. She could not by withholding her consent or authority tie the hands of the clerk and prevent the entry. Although nominally in her favor, the judgment had become a muniment of title to her successor in interest, and she could not impair its effect.

"On the authority of the former decision in this case the judgment and order appealed from should be affirmed.

"BELCHER, *C.*

"We concur.

"TEMPLE, *C.*

"VANCLIEF, *C.*

"For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

"GAROUTTE, *J.*

"VAN FLEET, *J.*

"HARRISON, *J.*"

199 [Endorsed:] No. 15435. Supreme court, State of California. Adam S. B. Baker, plaintiff & appellant, *vs.* John Brickell *et al.*, defendants and resp'd'ts. Opinion of the supreme court. Service of copy of the within is hereby admitted this — day of ——, 189–. —— ——, attorneys for —— ——. C. N. Fox, attorney for pl'ff & app'l't, Pacific Mutual building, 508 Montgomery street, San Francisco.

200 In the Supreme Court of the State of California, Dep't One.

ADAM B. BAKER, Appellant,
vs.
JOHN BRICKELL *et al.*, Respondents.

No. 15435. On Appeal from the Superior Court in and for the City and County of San Francisco.

And now, at this day, this cause being called and having been heretofore submitted and taken under advisement, and all and singular the law and premises having been fully considered, the opinion of the court herein is delivered by the court.

Whereupon it is adjudged and decreed by the court that the judgment and order of the superior court in and for the city and county of San Francisco in the above-entitled cause be, and the same are hereby, affirmed

201 [Endorsed:] No. —. In the supreme court, State of California. Remittitur. —— —— *vs.* —— ——. Clerk's costs, $—. Paid by appellant, $—; paid by respondent-, $—; total, $—. T. H. Ward, clerk, by —— ——, deputy.

202 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the chief justice and the justices of the supreme court of the State of California, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of California, before you or some of you, being the highest court of law or equity of the said State of California in which a decision can be had in the suit between Adam S. B. Baker, plaintiff, and John Brickell *et al.*, defendants, wherein was drawn in question the validity of a treaty or statute of or an authority executed under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said statute, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Adam S. B. Baker, plaintiff, as by his complaint appears, we, being willing that error, if any hath happened, should be duly corrected and full and speedy justice done to the party and parties aforesaid in this behalf, do com-

203 mand you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that

you have the same at Washington, in the District of Columbia, on the second Monday in October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, the 27th day of August, in the year of our Lord one thousand eight hundred and ninety-five.

Seal U. S. Circuit Court, Northern Dist. Cal.

W. J. COSTIGAN,
Clerk U. S. Circuit Court, Northern District of California,
By W. B. BEAIZLEY,
Deputy Clerk.

The above writ of error is hereby allowed.
STEPHEN J. FIELD,
Associate Justice of the Supreme Court of the United States.

204 [Endorsed:] Cal. supreme ct., No. 15435. No. 15435, U. S. Supreme Court. Adam S. B. Baker, plaintiff in error, *vs.* John Brickell *et al.*, defendants in error. Writ of error. Service of copy of the within is hereby admitted this — day of ——, 189–. —— ——, attorneys for —— ——. Filed Aug. 31, 1895. T. H. Ward, clerk, by A. W. Johnson, deputy. C. N. Fox, attorney for pl'ff in error, Pacific Mutual building, 508 Montgomery street, San Francisco. File.

205 In the Supreme Court of the United States.

ADAM S. B. BAKER, Plaintiff in Error,
vs.
JOHN BRICKELL *et al.*, Defendants in Error.

Know all men by these presents that we, Chas. N. Fox and M. B. Kellogg, both of the city and county of San Francisco, State of California, are held and firmly bound unto the said John Brickell, his heirs, executors, administrators, and assigns, in the full and just sum of five hundred dollars, to be paid to the said John Brickell, his heirs, executors, administrators, and assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 27th day of August, in the year of our Lord one thousand eight hundred and ninety-five.

Whereas lately, at a session of the supreme court of the State of California, in a suit pending in said court between Adam S. B. Baker, as plaintiff and appellant, and John Brickell, as defendant and respondent, and Maria Baker Batchelder, as defendant, a final judgment and decree was rendered against the said Adam S. B.

Baker and in favor of the said John Brickell, and the said
206 Adam S. B. Baker having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the said judgment and decree in the aforesaid suit, and a citation directed to the said John Brickell, citing and admonishing him to be and appear at the Supreme Court of the United States, to be holden at Washington, the second Monday of October next:

Now, the condition of the above obligation is such that if the said Adam S. B. Baker shall prosecute the said writ of error to effect and answer all costs if he fail to make his plea good, then the above obligation be void; else remain in full force and virtue.

CHAS. N. FOX.
M. B. KELLOGG.

Sealed and delivered in the presence of—

R. S. GRAY.

Approved by—

STEPHEN J. FIELD,
Associate Justice of the Supreme Court of the United States.

STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

Chas. N. Fox and M. B. Kellogg, the sureties named in the above bond, being duly sworn, each for himself says that he is a freeholder and resident within this State and is worth double the said sum of five hundred dollars, the penalty named in said bond, over and above his debts and liabilities, exclusive of property exempt from execution.

CHAS. N. FOX.
M. B. KELLOGG.

207 Subscribed and sworn to before me this 27th day of August, A. D. 1895.

[SEAL.] GEO. T. KNOX,
Notary Public in and for the City and County of San Francisco, State of California.

STEPHEN J. FIELD.

The above bond is approved both as to its form and suffic-ency. Dated this 28th day of August, A. D. 1895.

STEPHEN J. FIELD,
Associate Justice of the Supreme Court of the United States.

208 [Endorsed:] No. 15435. U. S. Supreme Court. Adam S. B. Baker, plaintiff in error, *vs.* John Brickell *et al.*, defendants in error. Bond. Copy. C. N. Fox, attorney for pl'ff in error, Pacific Mutual building, 508 Montgomery street, San Francisco.

209 In the Supreme Court of the United States.

ADAM S. B. BAKER, Plaintiff in Error,
vs.
JOHN BRICKELL *et al.*, Defendants in Error.

In error to the supreme court of the State of California.

Now comes the plaintiff in error, and for assignment of error in this case alleges that the supreme court of the State of California in giving its decision and judgment in the above-entitled cause did commit error as follows, to wit:

Assignment of Error Number I.

That said supreme court of the State of California by its decision and judgment erred in finding, adjudging, and decreeing that Maria Baker, although in possession of the lands of John H. Baker, deceased, as the administratrix of his estate, was the beneficiary under the act of Congress of March 8th, 1866, and that she was entitled to take a deed of said lands and premises in her own right from the city of San Francisco and its successor, the city and county of San Francisco, to the exclusion of the said plaintiff in error, Adam S. B. Baker.

Assignment of Error Number II.

That said supreme court of the State of California erred in finding for the defendant in error John Brickell and granting
210 judgment in his favor for that by the provisions of said act of Congress of March 8th, 1866, the heirs of said John H. Baker, deceased, among whom was this plaintiff in error, Adam S. B. Baker, and not the said Maria Baker, in her own right, were and are the beneficiaries under the said act of Congress, and thereunder are also the owners of said land and entitled to a conveyance thereof from the said city of San Francisco and its successor, the city and county of San Francisco, except as to the portion of said land to which the said Maria Baker was entitled as the survivor of the homestead claim of herself and said John H. Baker.

Assignment of Error Number III.

The said supreme court of the State of California erred in its judgment and decision for that the said deed by the city and county of San Francisco to the said Maria Baker created in her a trust as to all said realty over and above said homestead claim for the use and benefit of said heirs as beneficiaries, among whom was and is the said plaintiff in error, Adam S. B. Baker, and for that there was of said realty a large portion as determined by the said supreme court of the State of California and the *nisi prius* court, which tried said case, over and above said homestead claim, but said supreme

court denied said trust and decided against said trust and trust relationship, and refused any relief to said plaintiff in error and adjudicated and decided that said trust did not exist.

Assignment of Error Number IV.

That said supreme court of the State of California erred in its decision and judgment for that the said John H. Baker in his lifetime was the owner of all said realty and died as the owner thereof with no adverse claim existing against his said ownership as to said realty, and for that at his death, which was before the passage of said act of Congress of March 8th, 1866, the title to all said realty vested in his heirs, among whom was this plaintiff, in error Adam S. B. Baker (less the portion thereof coming to said Maria Baker as successor under the homestead claim of herself and John H. Baker, deceased), and for that the said Maria Baker (which is the same person referred to in all this record as Maria Baker Batchelder), upon the death of said John H. Baker, took possession of all said property as administratrix and was administratrix of the estate of John H. Baker, and for that she never in her own right took possession of any of said property or realty or claimed the same in her own right either under said homestead claim or otherwise howsoever, but always recognizing the rights of this plaintiff as the owner of his legal portion thereof as an heir of said John H. Baker, deceased, but said supreme court denied and decided against the ownership of said plaintiff in error, Adam S. B. Baker, to said realty or any part thereof.

211

Assignment of Error Number V.

That said supreme court of the State of California erred in its decision and judgment for that the said Adam S. B. Baker, plaintiff in error, is entitled to the possession as a tenant in common with said defendant in error, John Brickell, of an undivided twelfth of all said realty over and above the said homestead claim of Maria Baker, but said supreme court denied the right of said plaintiff in error to recover said lands or any portion thereof, undivided or otherwise, and refused him the right of possession of said realty or any portion thereof, undivided or otherwise.

212

Assignment of Error Number VI.

That said supreme court of the State of California erred in its judgment and decision for that by said findings and judgment of said superior court in and for the city and county of San Francisco, State of California, and also the said supreme court of the State of California, by its judgment and decision refused to plaintiff the benefits or any benefit of the provisions of said act of Congress of March 8th, 1866, in his favor, and refused to be governed by said provisions or any of them in determining the rights of the said plaintiff in error, Adam S. B. Baker, but the said supreme court of

the State of California decided against the right, title, and interest of plaintiff under said act of Congress in and to said realty or any part thereof.

Wherefore the plaintiff in error prays that the said judgment and decree and decision of the supreme court of the State of California against him, the said Adam S. B. Baker, plaintiff in error, in suit rendered on the 5th day of June, 1894, may be reversed, and that judgment be entered for the said plaintiff in error, Adam S. B. Baker, with his costs.

CHAS. N. FOX,
Attorney and Counsel for said Plaintiff in Error.

213 [Endorsed:] No. 15435. U. S. Supreme Court. Adam S. B. Baker, plaintiff in error, *vs.* John Brickell *et al.*, defendants in error. Assignments of error. Copy. C. N. Fox, attorney for pl'ff in error, Pacific Mutual building, 508 Montgomery street, San Francisco.

214 In the Supreme Court of the United States.

ADAM S. B. BAKER, Plaintiff in Error,
vs.
JOHN BRICKELL *et al.*, Defendants in Error.

To John Brickell, defendant in error, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the said State of California, wherein Adam S. B. Baker is plaintiff in error and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Stephen J. Field, associate justice of the Supreme Court of the United States, this 28th day of August, in the year of our Lord one thousand eight hundred and ninety-five.

STEPHEN J. FIELD,
Associate Justice of the Supreme Court of the United States.

215 In the Supreme Court of the United States.

ADAM S. B. BAKER, Plaintiff in Error,
vs.
JOHN BRICKELL *et al.*, Defendants in Error.

UNITED STATES OF AMERICA,
Ninth Judicial Circuit, Northern District of California, State of California, City and County of San Francisco, } *ss:*

On this 3rd day of September, A. D. 1895, personally appeared B. J. Akerman before me, Geo. T. Knox, the subscriber, a notary

public in and for said city and county of San Francisco, State of California, duly commissioned and sworn, and makes oath that and, being by me first duly sworn, deposes and says that he is and was at all the times hereinafter stated a white male citizen of the United States, over the age of twenty-one years, and is not and never was a party to the above-entitled action in any way; that he served the annexed citation in said action and matter above entitled upon E. J. & J. H. Moore, Esqs., attorneys of record, and who were at all the times hereinafter stated and still are the attorneys of record in said action for the defendant in error John Brickell at and in said city and county of San Francisco, in the said State of California, and in the said district of California, on the 31st day of August, A. D. 1895, by personally delivering to and leaving with E. J. Moore, personally, who then was and still is a member of said firm of E. J. & J. H. Moore, a full, true, and correct copy of said citation, at said city and county of San Francisco, in said State and dis-
216 trict, and on said 31st day of August, A. D. 1895.

And deponent further says that on said 31st day of August, A. D. 1895, A. N. Drown was then and still is counsel of record in said action for the defendant in error John Brickell; that on said day and for a long time prior thereto said Drown had and still has a law office in said city and county, and also a residence and dwelling-house in said city and county, and a family; that on said 31st day of August, 1895, said Drown was absent from his said office, and also from his said residence, and also from said city and county during all of said day; that on said 31st day of August, 1895, and at and in said city and county, this deponent personally served the said annexed citation upon said A. N. Drown by personally leaving a full, true, and correct copy of said citation for him and at the said residence and dwelling-house of said Drown, in said city and county, to wit, No. 2550 Jackson street, in said city and county, with an adult person, to wit, Mary Kristensen, who then was a member of and a resident in the family of said Drown and was then and there present in said dwelling-house, all on said 31st day of August and in said city and county, State and district.

And deponent further says that on said 31st day of August, 1895, Jennie A. Brickell and Louise D. Brickell were and still are the executrices of the last will of said John Brickell, the defendant in error, who died before said August 31st, 1895, and that John Clinton Brickell was on said day and still is executor of said last will, and that on said 31st day of August, 1895, in said city and county, State and district, this deponent personally served said annexed
217 citation on said Louise D. Brickell, executrix, and as such executrix, by personally delivering to and leaving with her personally a full, true, and correct copy of said citation, on said 31st day of August, 1895, at said city and county and in said district and State.

And deponent further says that on said 31st day of August, 1895, and for a long time prior thereto, said Jennie A. Brickell and John Clinton Brickell had and still have a residence and a dwelling-house in said city and county, and, with said Louise D. Brickell,

were and still are a family and living together as such with others in the family; that on said 31st day of August, 1895, said Jennie A. Brickell and John Clinton Brickell were each absent from said residence when deponent called thereat, between the hours of one o'clock in the afternoon and six o'clock in the afternoon of that day, for the purpose of serving said citation on them and each of them; that deponent, at said city and county, district and State, on said 31st day of August, 1895, personally served the annexed citation upon each, respectively, the said Jennie A. Brickell, executrix, and as — executrix of the last will of John Brickell, the defendant in error, then deceased, and John Clinton Brickell, executor, and as such executor of the last will of John Brickell, the defendant in error, then deceased, by personally leaving for each of them, respectively and separately, a full, true, and correct copy (to wit, two such copies altogether, one for each) of said citation at the said residence and dwelling-house of said Jennie A. Brickell and John Clinton Brickell, in said city and county, to wit, No. 1023 Green street, in said city and county, with an adult person, to wit, Louise D. Brickell, who then was a member of and a resident in
218 the family of each, respectively, said Jennie A. Brickell and John Clinton Brickell, and was then and there present in said dwelling-house, all on said 31st day of August, 1895, and in said city and county, State and district.

B. J. AKERMAN.

Subscribed and sworn to before me this 3rd day of September, A. D. 1895.

GEO. T. KNOX,

[SEAL.] *Notary Public in and for the said City and County of San Francisco, State of California.*

219 [Endorsed:] No. —. U. S. Supreme Court. Adam S. B. Baker, plaintiff in error, *vs.* John Brickell *et al.*, defendants in error. Citation, with proof of service. Copy. C. N. Fox, attorney for pl'ff in error, Pacific Mutual building, 508 Montgomery street, San Francisco.

220 *Clerk's Certificate.*

In the Supreme Court of the State of California.

ADAM S. B. BAKER, Plaintiff in error,
v.
JOHN BRICKELL, Defendant in Error; MARIA BAKER BATCHELDER, Defendant.

I, T. H. Ward, clerk of the supreme court of the State of California, do hereby certify that the foregoing printed and written pages contain a full, true, and correct transcript of all the proceedings in the above-entitled cause, and that the same constitute the return to the annexed writ of error, and that said transcript contains all the pleadings, proceedings, and papers contained in the

record of said cause upon which the said cause was heard and tried in the supreme court of the State of California, and also contains the opinion of said court, the judgment of said court, a copy of the writ of error, a copy of the citation, a copy of the bond given by the plaintiff in error, and a copy of the assignment of errors; and

221 I further certify that the plaintiff in error lodged with me as clerk of said supreme court of the State of California, and in my office as such clerk, a copy of said writ of error for the defendant in error in said cause.

Witness my hand and the seal of said supreme court of the State of California this 16th day of September, A. D. 1895.

[Seal Supreme Court of California.]

T. H. WARD, *Clerk*,
By A. W. JOHNSON,
Deputy Clerk.

222 [Endorsed:] Case No. 15,435. California supreme court. Term No., —. Adam S. B. Baker, pl'ff in error, *v.* John Brickell, defendant in error; Maria B. Batchelder, defendant. Filed ——, 1895. —— ——, clerk, by —— ——, deputy clerk.

Endorsed on cover: Case No. 16,038. California supreme court. Term No., 345. Adam S. B. Baker, plaintiff in error, *vs.* John Brickell. Filed September 28th, 1895.

166-717

166-717

Office Supreme Court, U. S.
FILED.
FEB 2 1897
JAMES H. McKENNEY,
CLERK.

Defendant's Notice and Brief on his Motion to Dismiss for Want of Jurisdiction

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1896.

No. 345.

ADAM S. B. BAKER,
PLAINTIFF IN ERROR,

vs.

JOHN BRICKELL,

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED JANUARY ..... 1897.

(16,038.)

IN THE SUPREME COURT OF THE UNITED STATES.

ADAM S. B. BAKER,
Plaintiff in Error,
vs.
JOHN BRICKELL,
Defendant in Error, and
MARIA BAKER BATCHELDER.

No. 345
October term, 1896.

DEFENDANT'S NOTICE OF MOTION TO DISMISS.

The plaintiff in error in the above entitled cause will please take notice, that at the opening of the Supreme Court of the United States, in the Capitol building in Washington, D. C., on Monday, March 1st, 1897, at 12 o'clock noon of that day, or as soon thereafter as the matter can be heard, the defendant in error, John Brickell, will move said court to dismiss the pending writ of error in this cause, on the ground that the court has not jurisdiction in the premises, there being no federal question in the record.

With said motion will be used and submitted the following printed brief served on you herewith.

Respectfully,

S. W. HOLLADAY,
E. B. HOLLADAY,
A. N. DROWN,
J. H. MOORE,
Counsel for Deft. in Error.

San Francisco, January 27th, 1897.

IN THE SUPREME COURT OF THE UNITED STATES.

ADAM S. B. BAKER, Plaintiff in Error, vs. JOHN BRICKELL, Defendant in Error and MARIA BAKER BATCHELDER.	No. 345 October term, 1896.

BRIEF ON DEFENDANT'S MOTION TO DISMISS FOR WANT OF JURISDICTION.

The subject of this action is some land in San Francisco, lying on the outer or western edge of the city, bordering on the Golden Gate and Pacific Ocean, comprising some seventy acres.

It is a part of the "Pueblo lands" claimed by the City of San Francisco in her petition filed in the U. S. Land Commission in 1852, which claim was finally confirmed by Mr. Justice Field in the U. S. Circuit Court, May 18, 1865.

It is also a part of the "Outside Lands," which were relinquished to the city by an Act of Congress, approved March 8, 1866, and entitled

"An Act to quiet the title to certain lands within the corporate limits of the City of San Francisco," which reads as follows:

"Be it enacted * * * That all the right and title of the United States to the land situated within the corporate limits of the City of San Francisco in the State of California, confirmed to the City of San Francisco by the decree of the Circuit Court of the United States for the Northern District of California, entered on the 18th day of May, one thousand eight hundred and sixty-five, be, and the same are hereby relinquished and granted to the said City of San Francisco and its successors, and the claim of the said city to said land is hereby confirmed, subject, however, to the reservations and exceptions designated in said decree, and upon the following trusts, namely, that all the said land, not heretofore granted to said city, shall be disposed of and conveyed by said city to parties in the bona fide actual possession thereof, by themselves or tenants, on the passage of this act, in such quantities and upon such terms and conditions as the Legislature of the State of California may prescribe, except such parcels thereof as may be reserved and set apart by ordinance of said city for public uses: * * * "

In the year 1860, and before the lands were so relinquished to the city, but while the city was asserting its claim to the same as part of its Pueblo Lands, one John H. Baker with his wife and children settled upon the land in question.

They were within what was then called the "Outside Lands."

On September 22, 1862, said Baker and his wife duly executed and recorded a declaration of homestead upon said land.

Said Baker died in March, 1863, leaving his wife and their family of six children living upon the land.

The present plaintiff in error was the youngest of said children.

Up to the time of Baker's death, the titles to all said outside lands were unsettled, the City of San Francisco was asserting its right thereto under its Pueblo title, while the United States were asserting title therto as being government land.

The city's claim of title to the land finally prevailed, being so adjudged in the decree of the Circuit Court of the United States, rendered by Justice Field on May 18, 1865.

The United States, however, on March 8, 1866, in order to quiet the titles to said lands, and to release its formerly asserted paramount title thereto, passed the act first above recited, granting said lands to the City of San Francisco.

The City of San Francisco, thus vested with the unquestioned tftle, both as Pueblo land and as grantee of the United States, made ready to distribute the land to the many possessors who were upon the same.

For this purpose, a plan was carefully formulated by the city, whereby the whole tract should be divided into streets, blocks, lots, etc., and the lands (excepting such parts as were needed for public uses) should be secured to the respective possessors.

This plan was adopted by the Board of Supervisors, and was known as Order 800.

It provided for a map of the lands to be made: upon that map the names of the respective possessors were to be delineated on the places indicating their respective lands.

No possessor could have his name so delineated on his tract unless he had shown his good faith by first paying into the city treasury the amount which had been assessed against his parcel to cover the expenses of the scheme, and also paying several years' back taxes thereon. But when the possessor had done these things and his name had been delineated upon said map, such map and such delineation should of itself constitute the evidence of his title thereto.

Directly after the passage of "Order 800," the Legislature of California passed an act confirming it, and confirming in advance all that the city might do under it. (See Statutes of Cal., 1867-8, page 379.)

Such was the plan or scheme arranged by the City of San Francisco in order to accomplish an equitable distribution of said outside lands to the actual possessors. The "Order 800" can be read in full in the statute last above cited. And the entire history of these "outside land" titles can be found still more elaborately stated by Mr. Justice Field, in the case of Trenouth vs. San Francisco, 100 251 U. S, 251.

Mrs. Maria Baker had been all this while (from March, 1863, to December, 1872) living upon the land here in question, witn her siq children.

After her husband's death she had been appointed administratrix of his estate.

She had called this land the property of his estate, although in fact it was not; as neither he nor any other private settler could

have acquired the title thereto prior to the acts of legislation aforesaid. She had done but little in the way of administration of his estate when she ceased to follow further the theory that her husband had any estate in said land.

She and her husband had declared a homestead on this land (tr. page 51, orig. paging). Upon his death, the entire title vested in her as the survivor, for such was the provision of the then existing homestead law. (Cal. Statutes, 1862, p. 519, sec. 4.) It was hers by descent, even though not set off by any probate court (Herrold vs. Reen, 58 Cal. 445.) And such was the decision of the Court herein. (tr. p. 83, orig. paging.) Therefore, when the city authorities set about carrying out the provisions of order 800, distributing the outside lands to the actual possessors, Mrs. Baker, as such, asserted her right to this land.

She paid the back taxes and the assessment imposed upon this parcel; (fol. 67,) and her name, as the owner thereof was duly delineated on the map, upon the part representing this land. (p. 59-60.)

Under a statute of California, approved March 24, 1870, the city was authorized to issue its deeds to such possessors as had completed their titles by procuring their names to be so placed upon said map (Stats. of Cal. 1869-70, page 353).

So, on Dec 2d, 1872, Maria Baker petitioned the Board of Supervisors of San Francisco to issue to her the city deed for said lands.

The Board heard her evidence, and granted her petition, and the city deed was executed to her, conveying to her, Maria Baker, the land in dispute.

Thus far, she had remained the widow of John H. Baker. She had six children; but the land was her own private property.

Afterwards she married again. She became the wife of David F. Batchelder, whereby she becomes known as Maria Baker Batchelder.

Thereafter she borrowed large sums of money, aggregating $42,500.00, from defendant, John Brickell, and as security therefor gave to Brickell her notes and mortgages upon the land here in dispute.

She did not pay back the money, and so Brickell duly foreclosed and took the land at sheriff's sale, and secured the sheriff's deed and possession.

After said Brickell has gone into possession, the present plaintiff, Adam S. B. Baker (son of John H. Baker and Maria Baker, his wife) begins this suit, which he calls a suit in equity.

He claims that all said land became the property of his father's estate through the grant of the Act of Congress of 1866; and that he, as the heir to one-twelfth of his father's estate, was vested with the title to one-twelfth undivided, of this land. He sues John Brickell as being in possession of his land, and he makes his mother defendant, charging that she defrauded both his father's estate and him by taking the city deed to herself, instead of having said deed run to the estate.

The cause was fully tried and was finally decided in favor of defendant Brickell, who alone defended.

Plaintiff appealed to the State Supreme Court, which affirmed the judgment for defendant.

The plaintiff then sued out the present writ of error.

The plaintiff has tried to make it appear that his present claim to this land involves an examination of the Act of Congress of March 8, 1866, to see whether, under it, his father's estate was not the real possessor, and whether the city was not bound to grant the land only to the real possessor, etc.

The plaintiff asserts that, since his father's estate was in process of administration at the time when Congress passed the act in question, his estate, as the possessor, was entitled to take the title under the act.

He says that he, as one of the six children of his father, is therefore entitled to one-twelfth of his estate; and hence is entitled to one-twelfth of this land, which he has followed and found in the hands of defendant Brickell.

These bare assertions or claims of plaintiff do not make a federal question.

In Linford vs. Ellison, 155 U. S. 508, this Court said:

"As was observed in Lynch vs. U. S. 137 U. S. 280, 285: 'The validity of a statute is not drawn in question every time rights claimed under such statute are controverted, nor is the validity of an authority, every time an act done by such authority is disputed. The validity of a statute, or the validity of an authority is drawn in question when the existence, or constitutionality, or legality of such statute or authority is denied, and the denial forms the subject of direct inquiry.'"

Citing Baltimore and P. R. R. vs. Hopkins 130 U. S. 210, 226.

S. Car. vs. Seymour, 153 U. S. 353.

The appeal was dismissed.

So, in this case, the mere claim of plaintiff that his rights arose under the Act of Congress, is not enough to give this court jurisdiction.

The State Court has found in this case, that Mrs. Baker was the real possessor of this land and that she took the city title wholly to herself. (fol. 59 and 68.)

Plaintiff claims that this is a denial of a right asserted under an Act of Congress.

We think it is not.

We believe that since the United States delegated to the city the right or duty of distributing this land to the actual possessors, it was left to the City to determine who were such possessors; and that anyone who took or claimed such title, took or claimed under the city and not under the United States.

"When a resort is made by individuals or the government to the mode provided by the statute of a state where real property is situated, for the transfer of its title, the effect and conditions prescribed by the statute will apply, and such operation given to the instrument of conveyance as is there designated."

U. S. vs. Illinois Central, 154 U. S. 237.

And further, it must be remembered that this allotment of land was all within the City of San Francisco, and that the land itself was, all of it land to which the city's original and independent Pueblo title had been judicially declared.

Therefore, this final and general relinquishment by the United States to the city for its inhabitants or for the possessors was no more than a quitclaim deed.

Such a general relinquishment does not permit any single possessor to set up the claim that the Act was a special grant to him of the land on which he may have been settled.

Hoadley vs. San Francisco, 94 U. S. 12.

What the city under the State authorities may have chosen to do with any particular parcel (providing that the disposition was within the general range or purpose) is a matter with which the State alone has to do.

U. S. vs. Illinois Central, 154 U. S. 239:

"The United States possess no jurisdiction to control or regulate within a State, the execution of trusts or uses created for the benefit of the public, or of particular communities or bodies therein. The jurisdiction in such case is with the State or its subordinate agencies."

For the foregoing reasons alone, plaintiff's contention would not lead to a federal question.

But apart from that, from the averments of the complaint itself, plaintiff is precluded from claiming any title under the Act of Congress of March, 1866.

In the complaint (p. 2) plaintiff alleges: "That at the time of his death the said John H. Baker was the owner and in possession of" the land in question. He died in March, 1863.

That averment alone cuts off the federal question arising out of the act of 1866. For if plaintiff's father was the owner when he died, three years before the passage of the Act of Congress, there remained nothing which the act could grant to his father's estate.

Hence he, claiming as his father's heir, cannot set up the Act of Congress as his source of title.

That is another reason why this court has no jurisdiction.

Again, the record shows another reason why this plaintiff cannot claim any title whatever as having come to him from his father's estate. It is this:

His father and mother, on September 23, 1862, filed a joint declaration of homestead upon this land under the California law relating to homesteads. (p. 51.)

At the time Baker died the statute was such that, upon the death of either spouse, the entire homestead estate vested in the survivor. (Stats. of 1862, page 518, sec. 4.)

There is here a finding that Baker and wife did make a declaration of homestead covering this land (fol. 151). There is a conclusion of law or decision.

"That upon the death of John H. Baker on the 30th day of March, 1863, under and by virtue of her homestead right, the said Maria Baker (now Maria Baker Batchelder, defendant herein) became and was seized in fee by survivorship of the whole of the said Baker Tract or Golden Gate Ranch, so far as any right, title, interest or estate therein had theretofore existed in said John H. Baker and his said wife, Maria Baker, or either of them, free from any rightful claim by any heirs at law of said John H. Baker, or by his estate" p. 83.

The effect of that decision, based upon that finding of fact, was, to conclude the case against plaintiff. For if, upon his father's death, his mother succeeded to the title to the entire tract, this plaintiff could have no rights thereto as heirs of his father.

Upon this matter of purely state statute law the decision of the State Court is final. The judgment for defendant Brickell was affirmed by the State Supreme Court.

That affirmed this conclusion of the lower court, which alone was sufficient to support the judgment, and which is not within the jurisdiction of this court.

There are two other grounds stronger than the foregoing, which are conclusive upon this motion.

One of them is this: Whatever may be claimed touching the Act of Congress or the Act of the Legislature or the City Ordinance or the City Deed, the plaintiff's action did not attack or assail either of them. It does not in any way attempt to call in question the validity of the Act of Congress or of any right or authority exercised thereunder or any title claimed by the defendant Brickell under or by virtue thereof. On the contary it distinctly affirms the defendant's title, however derived, and seeks to obtain the benefit thereof. The prayer of the Complaint (orig. p. 22) is for a decree adjudging "that the title held by the said Maria Baker Batchelder "on the first day of June, 1874, was, as to the undivided one-twelfth "part of all the lands and premises described in Subdivisions V and "VI, of this Complaint, and at all times thereafter continued to be "held in trust for the benefit of this plaintiff; that the defendant Brickell took under his said mortgage and under the foreclosure "thereof with full knowledge of said trust," etc.

The Supreme Court of the State always regarded this action as one brought to establish a trust, and it disposed of the same accordingly. On the first appeal (87 Cal. 332) it said: "The action is brought to establish a trust against defendant Brickell." And on the last appeal, from which this writ of error has been taken, it said (102 Cal. 621): "The plaintiff brought this action to establish a trust in certain lands in the City and County of San Francisco against the defendant Brickell."

Whether the defendant Brickell was trustee of the title which he held, either under express contract or by operation of law, is purely a question of general law and is dependent not on federal statutes or Constitution, but solely upon the general principles of equity. Whether Maria Baker, by reason of her relation of wife to the plaintiff's ancestor, or by reason of her relation of mother to the plaintiff, or because of her obligations as administratrix of the estate of John H. Baker, deceased, or by reason of any fraud or mistake, was chargeable with a trust in favor of the plaintiff touching the property conveyed to her by the City Deed, or any part thereof; and whether the defendant Brickell, by reason of notice or knowledge or of any other matter or thing, took that property charged with the same trust, are enquiries wholly foreign to any question of federal statute, treaty or Constitution. And whether the highest Court of the State properly answered and decided those enquiries is something that this court will not examine on writ of error.[1]

[1] Smith vs. Adsit, 23 Wall. 373.

The other ground—and it is absolutely decisive—is this: The plantiff was bound and estopped by a former adjudication, which precluded any further litigation of his pretended right. A judgment against a defendant quieting all adverse claims on his part to any land estops that defendant from asserting in any subsequent action any title adverse to the plaintiff anterior to the entry of that judgment.[1] The plaintiff never had or claimed any estate or interest in the property involved in this action except through his father, John H. Baker, and by virtue of his position as heir of his father. His father died on the 30th day of March, 1863, and the plaintiff's title, if any, vested on that day. On the 13th day of May, 1876, and before her mortgage to Brickell, Maria Baker Batchelder, (the subsequent grantor of the defendant Brickell, through mortgages, decree of foreclosure and Sheriff's deed), brought suit against this plaintiff to quiet her title to all the lands described in the Complaint in this record against all existing adverse claims of the plaintiff herein; and judgment was regularly obtained and entered in that action by which it was adjudged that said Maria Baker Batchelder, as against said Adam S. B. Baker, was the owner of the lands referred to and that said Adam S. B. Baker had no right, title or interest therein or thereto, or in or to any part thereof. The defendant in that action (plaintiff in error here) took an appeal from that judgment; but he failed to reverse or modify it. That judgment was affirmed by the highest court of the State of California[2] and so has become, and was at the time of the trial of the cause now sought to be reviewed on this writ of error, a final, irrevocable and conclusive adjudication to the effect given above.

This former suit and the judgment therein were duly pleaded by the defendant Brickell in his Answer (orig. pp. 35, 36) and Supplemental Answer (Id., pp. 38,39), as an estoppel and bar; and the trial court (Id., pp. 78, 79, 85, 86) held the plea good and decided that by reason of the judgment in the former suit, the plaintiff was forever barred and estopped to prosecute the present action. This decision the Supreme Court of the State has affirmed by the judgment which this Court is now asked to review.

Moreover, by his Complaint in this action, the plaintiff in error recognized this judgment as an obstacle in his path and sought to bring into question the validity of it. He alleged (orig., p. 17-20) the institution of the suit to quiet title by Maria Baker Bachelder and the recovery of judgment therein; and sought to assail and invalidate the same for alleged want of jurisdiction and for alleged fraud on the part of the defendant Brickell and the said Maria Baker Bachelder in instituting the suit and obtaining the judgment. And the prayer of his Complaint was primarily (orig. p. 22) "that "the judgment and decree of the District Court * * * in case "number 20,431 aforesaid, entitled Maria B. Batchelder against "Adam S. B. Baker is fraudulent and void and vacating and setting "aside the same." The trial court decided all these allegations against the plaintiff (Id. pp. 78-82); and this decision was approved by the highest Court of the State.

---

[1] Riverside Land and Irr. Co. vs. Jenson, 108 Cal. 146.
[2] Batchelder vs. Bakor, 79 Cal. 266.

In its opinion given when the judgment in this record was rendered, the Supreme Court of California devoted almost its entire attention to this judgment. For all other matters it was content to simply refer to the book and page where is recorded its former decision rendered on the first appeal. It referred to the affirmance on appeal of the judgment in the suit of Batchelder vs. Baker; decides that the various charges of fraud in its procurement are "wholly without foundation and false;" and declares that this judgment in favor of Maria Baker Batchelder 'had become a muni- "ment of title to her successor in interest, and she could not impair "its effect." Of course its effect was by way of bar and estoppel; and it was solely by reason of this that it had become a bulwark to the defendant Brickell's title.

From the foregoing it is evident that this decree quieting Maria Baker Batchelder's title—and consequently the title of her successor in interest, Brickell—against the claim, and the only possible claim, of the plaintiff in this action, was not only a sufficient basis for the decision of the trial court and of the judgment of the Supreme Court affirming that decision, but that it was actually and plainly the substantial ground of the action of the highest Court of the State in affirming the judgment which had been entered pursuant to that decision. In its first opinion, by which the former judgment of the trial Court was reversed and the cause sent back for a new trial, this judgment was not discussed, for it had not then become final. Prior to the last trial of this case it was affirmed by the Supreme Court. It still continued to be a matter in issue under the original complaint and Answer, but the plaintiff again assailed it by Supplemental Complaint (orig. p. 41); and the defendant again urged it as an estoppel by Supplemental Answer (Id. p. 38). And these constituted the only features that were in the case on the re-trial. As the Supreme Court says: (Tr. p. 196) "In the record presented on this appeal the facts are the same as on the former appeal, and the decision on that appeal must therefore be treated as the law of the case and be followed here." It then proceeds to consider this new matter of the former judgment quieting title.

The course of this Court under such circumstances is plainly marked out by its former rulings. The estoppel of the former judgment necessarily disposed of the whole case. There could be nothing left outside of it. It was not only sufficient to support the judgment now sought to be reviewed, but it excluded all other grounds of support. A decree quieting title while not in rem strictly speaking, yet fixes and settles the title to real estate.[1] And it is a bar to subsequent litigation on the same subject-matter.[2] The judgment of a court of competent jurisdiction directly upon the point is, as a plea, a bar; or, as evidence, conclusive between the same parties and their priores upon the same matter directly in question in another cause.[3] It is res judicata as to that issue; and the same matter cannot be litigated between the same parties or their privies in any action touching

[1] Perkins vs. Wakeham, 86 Cal. 580.
[2] Reed vs. Calderwood, 32 Cal. 109.
[3] Love vs. Waltz. 7 Cal., 252.

the same property.[1] The controversy in both actions being in effect between the same parties and in relation to the same land; and the first action having been brought to quiet the title of the plaintiff thereunder against the all adverse claims of the plaintiff herein; and the title relied upon in the first action having been precisely the same as that asserted in the present action; and the first action having been tried upon its merits, the judgment rendered therein, having been properly pleaded, was effectual as a bar to the maintenance of this suit and a good and sufficient defense thereto.[2] And the former adjudication is final and conclusive not only as to the matter actually determined, but as to every other matter which the parties might have litigated and have had decided as incident to, or essentially connected with, the subject-matter of the litigation and every matter arising within the legitimate purview of the original action, both in respect to matters of claim and of defense.[3] The highest sort of estoppel is that by judgment. Whatever is settled by a judgment is the result of an investigation conducted under the most favorable rules that mankind have been able to devise for the exposure of falsehood and the ascertainment of truth. Estoppel, therefore, as applied to judgments, should be defined as "that which prohibits a party from disputing the truth."[4] The doctrine of estoppels in judgments, instead of being odious, is one of the most conservative and salutary doctrines of the law.

Such being the case, and it being also the law that the decree quieting title conclusively established the plaintiff's ownership and effectually cut off every possible interest of the defendant,[5] there was nothing which the plaintiff could re-litigate in this suit, whether federal or non-federal in its character, excepting only the jurisdiction of the Court, which rendered the former judgment, and any possible fraud or mistake which might have entered into its recovery. These questions the plaintiff did attempt to raise and they were decided against him and with that decision he was dismissed from the court. Whether that decision was rightly or wrongly rendered is not a matter which can be reviewed here on writ of error.

The record in this case is closely similar to that in Adams County vs. Burlington and Ms. R. R. Co., 112 U. S. p. 123, where this Court said: "The record discloses that this separate and distinct defense "was made, and that it in no way depended on the validity or invalidity of the original title of the county. In our opinion it is clearly "to be inferred from the decree of the Court of original jurisdiction, "which was affirmed by the Supreme Court, that the decision in favor "of the company was placed entirely on that ground * * * and "that the decree rested alone on the defense of estoppel, which was "broad enough to control the rights of the parties without disposing of the federal question which it was attempted to raise."

---

[1] Jackson vs. Lodge, 36 Cal. 28.
[2] Jones vs. City of Petaluma, 36 Cal. 230.
[3] Freeman on Judgments, § 249.
[4] Id § 247.
[5] Id § 309.

In this connection, it may stated that, while this Court may examine and consider the opinion of the highest Court of the State in its enquiry as to what questions were raised and decided, yet that opinion does not constitute the record of the case, and is not a controlling part of it. The findings and judgment of the trial Court are properly the record.[1]

We insist then that although a clearly federal question had been rasied by the plaintiff in this action, and even if such question had been litigated on the trial and had been considered and decided by the highest Court of the State on appeal, yet the State Court having also decided against the plaintiff in error upon the independent and controlling ground of estoppel by a former judgment, and that ground being broad enough to support the judgment, and being also purely non-federal in its character, this Court will dismiss the writ of error without looking into or considering the federal question.[2]

Any one of the foregoing matters was, of itself, a sufficient defense to plaintiff's complaint. Upon any one of them the State Court was amply justified in giving judgment for defendant Brickell, without deciding or even considering the question whether Baker's estate did or did not take under the Act of Congress.

To be more explicit:

1. Plaintiff's allegation in his complaint, that his father (while alive) owned the land, coupled with the fact that he died March, 1863, while the Act of Congress was passed March, 1866, cuts off the plaintiff from all connection with the act of 1866, and prevents the court in deciding the case from considering said Act of Congress.

2. The fact that there was a homestead, by which Maria Baker succeded to the entire title (such as it was) on her husband's death, is of itself a sufficient defense under the State laws, and leaves plaintiff no right to appeal to the Act of Congress.

3. The defense of bar and estoppel by judgment being held good, and the facts found, decides the case and precludes the court from even enquiring into the matter of plaintiff's present claim.

It was so decided in the case of People vs. Holladay, No. 566, October term of 1895, where the writ of error was dismissed in November, 1895.

Defendant Brickell is prepared to meet this case upon its merits, if need be, as he did in the State courts.

But the fact that there is no federal question renders that course unnecessary.

For many years this Court (when enquiring into the question of its jurisdiction under the judiciary act of causes on writs of error to State courts (has followed the rule laid down in Lawler vs. Walker, 14 How. 153, thus:

"It must be that such a federal question was necessarily involved in the decision * * * that it was one which necessarily arose from the case itself, and *that it could not give a judgment in the case upon its merits without deciding that it involved a question* of conflict with the Constitution of the United States."

[1] Gross vs. U. S. Mining Co., 108 U. S. 485.
[2] Bacon vs. Taxes, 163 U. S. 227.

Applying that doctrine to this case, we see that it was not at all necessary, in order to decide this case upon its merits, that the State Court should have decided anything regarding the Act of Congress or the grantees thereof.

The court could and did reach, and was justified in reaching, a final judgment for defendant upon each one of the points above set forth.

Wherefore, we say again, there is no federal question in this record.

This Court has no jurisdiction and this writ should be dismissed.

Respectfully submitted,

S. W. HOLLADAY,
E. B. HOLLADAY,
J. H. MOORE,
A. N. DROWN,
Counsel for Defendant in Error.

San Francisco, January 11, 1897.

166-717

Office Supreme Court, U. S.
FILED
FEB 12 1897
JAMES H. MCKENNEY,
CLERK.

166-717

Brief of Plaintiff in Error on Defendant's Motion to Dismiss for want of Jurisdiction.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1896.

No. 345.

ADAM S. B. BAKER,
PLAINTIFF IN ERROR,

vs.

JOHN BRICKELL,
DEFENDANT IN ERROR,
AND MARIA BAKER BATCHELDER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED FEBRUARY..... 1897.

(16,038.)

IN THE SUPREME COURT OF THE UNITED STATES.

ADAM S. B. BAKER,
Plaintiff in Error,
vs.
JOHN BRICKELL,
Defendant in Error, and
MARIA BAKER BATCHELDER.

No. 345.
October term, 1896.

BRIEF OF PLAINTIFF IN ERROR ON DEFENDANT'S MOTION TO DISMISS FOR WANT OF JURISDICTION.

From the record in this case, it appears that the land in controversy (excluding that described in paragraph five, page three—which is not involved in this litigation), all the land in suit, belonged to the Outside Lands of the City and County of San Francisco (page 3, folio 6), and that the defendant Maria Baker fraudulently and wrongfully obtained a deed from the City of San Francisco under the Act of Congress of March 8th, 1866, and under the Statutes of California and the laws and ordinances of the City and County of San Francisco enacted under and subsequent to said Act of Congress. The answer of the defendant Brickell denies that Maria's act in obtaining the deed was fraudulent (f. 26), but it does not deny that the lands were the very lands contemplated by and controlled by such Act of Congress of March 8th, 1866.

In fact, the very question in the case is the issue as to this wrongful grant by the trustee, viz: the City of San Francisco, to Maria Baker under such Act of Congress, and while she was administratrix of the estate of John H. Baker, and the findings of the trial court are to the effect that these lands were the very lands contemplated by the Act of Congress and controlled by it (f. 59) and that the interpretation of that Act, i. e. construction, was the issue in the case (Finding four, f. 84).

There is thus a Federal question involved and "There was drawn "in question the construction of * * * the Statute of * * * "the United States, and the decision was against the right, privilege "or exemption specially set up * * *."

It has been determined that this Court will take jurisdiction of cases arising under Acts similar to the Act of March 8th, 1866. That determination is plainly and fully apparent from the Arkansas Hot Springs' cases.

Rector vs. Gibbon, 111 U. S., 278, 284, 286.

On the authority of these cases, we submit that the motion should be denied.

We do not agree with the counsel of defendant in error that the city's claim of title to the land finally prevailed. The decree of the Circuit Court of the United States rendered by Mr. Justice Field May 18th, 1865, specifically established a trust in regard to these matters and did not give the city complete title in fee. Under the proper construction of the Act of Congress, Maria Baker, under her possession, was not the beneficiary.

Upon this brief, we submit the motion on the part of the plaintiff in error, and submit that it should be denied.

Respectfully,

CHAS. N. FOX,
Counsel for Plaintiff in Error.